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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

TRINITY TERM, 4 WILL. IV.

TO

HILARY TERM, 5 WILL. IV., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS:

BY

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AND

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BARRISTERS AT LAW.

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JUDGES
OF
THE COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.



The Right Honorable JOHN SINGLETON, Baron LYNDHURST,
Lord Chief Baron.

The Right Honorable JAMES, Baron ABINGER, Lord Chief Baron.

BARONS.

Sir JAMES PARKE, Knt.

Sir WILLIAM BOLLAND, Knt.

Sir EDWARD HALL ALDERSON, Knt.

Sir JOHN GURNEY, Knt.

ATTORNEYS-GENERAL.

Sir JOHN CAMPBELL, Knt.

Sir FREDERICK POLLOCK, Knt.

SOLICITORS-GENERAL.

Sir CHARLES CHRISTOPHER PEPYS, Knt.

ROBERT MUNSEY ROLFE, Esq.

Sir WILLIAM WEBB FOLLETT, Knt.

1. *NAME OF THE*
2. *LINE STYLING & SP. UNIFORMS*
3. *DISCOURSES*

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, 4 WILL. IV.

REVENUE.

1834.

The KING v. The Mayor and Commonalty of the City
of LONDON. In the Matter of MOZELEY WOOLF's Fine.

LEWIS Levy and Moxeley Woolf having been indicted at the Old Bailey for a misdemeanour committed within the city of London, the indictment was removed by *ceteriorari* into the Court of King's Bench. The defendants having been tried upon that indictment at Guildhall, before the Lord Chief Justice, were found guilty, and being afterwards called up for judgment in the Court of King's Bench, a fine was imposed upon Levy of 5,000*l.*, and upon Woolf of 10,000*l.* These fines being estreated into the Exchequer, the city of London made claim to the

The City of London is entitled to a fine imposed for a misdemeanor committed within the city, though the fine be adjudged by the Court of King's Bench sitting at Westminster.

*Revenue,
1834.*

The KING
v.
The Mayor, &c.,
of
LONDON.

fine imposed upon *Moseley Woolf*, and the following is the form of the proceedings under that claim:—

MORE COMMON MATTERS OF EASTER TERM,
In the 59th Year of the Reign of King George III.

ENGLAND.—AN ESTREAT of fines imposed and set in the Court of our lord the king, before the king himself, at *Westminster*, of *Easter Term*, in the fifty-ninth year of the reign of king *George* the Third, but not paid.

LONDON.—Of *Lewis Levy*, late of *London*, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 5,000*l*, and he is sentenced to be imprisoned in His Majesty's gaol, at *Gloucester*, in and for the county of *Gloucester*, for the term of two years. And it is ordered, that the Marshal of the *Marshalsea* of this Court, or his deputy, do deliver the said *Lewis Levy* into the custody of the keeper of the said gaol of *Gloucester*, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of *London* are commanded of the goods and chattels, lands and tenements of the said *Lewis Levy*, to levy the said fine, and to have the said sum of money in this Court in three weeks of the *Holy Trinity*, and the like command is given to the sheriff of *Middlesex* 5000*l*.

Of *Moseley Woolf*, late of *London*, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 10,000*l*. And he is sentenced to be imprisoned in the *House of Correction*, in *Cold Bath Fields*, in and for the county of *Middlesex*, for the term of two years. And it ordered, that the Marshal of the *Marshalsea* of this

Court, or his deputy, do deliver the said *Mozeley Woolf* into the custody of the keeper of the said *House of Correction*, in *Cold Bath Fields*, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of *London* are commanded of the goods and chattels, lands and tenements of the said *Mozeley Woolf* to levy the said fine, and to have the said sum of money in this Court in three weeks of the *Holy Trinity*: and the like command is given to the sheriffs of *Middlesex* 10,000*l.*

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THE CLAIM of the mayor and commonalty and citizens of the city of *London*, upon the account of *E. H. Lushington*, Esq., coroner and attorney of our sovereign lord king *George* the 4th, accounting for monies by him received, and payable to his said majesty, amounting to 5,912*l. 8s. 10d.* The same mayor and commonalty and citizens, by *William Foxton* their attorney, claim a certain fine of 5,000*l.*, and also a certain fine of 10,000*l.*, which have been retained or forfeited, and hereinafter particularly mentioned, but with which the said coroner and attorney is not charged, only to the amount of 5,912*l. 8s. 10d.*, part of the said sum of 10,000*l.*, in his account before the clerk of the pipe of his said majesty's *Exchequer*, in these words, (to wit) *England*—An estreat of fines imposed and set in the Court of our lord the king, before the king himself, at *Westminster*, of *Easter Term*, in the 59th year of the reign of king *George* the Third, but not paid. *London*, of *Lewis Levy*, late of *London*, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 5,000*l.*, and he is sentenced to be imprisoned in his majesty's gaol of *Gloucester* for the term of two years. And it is ordered, that the Marshal of the *Marshalsea* of this Court, or his deputy, do

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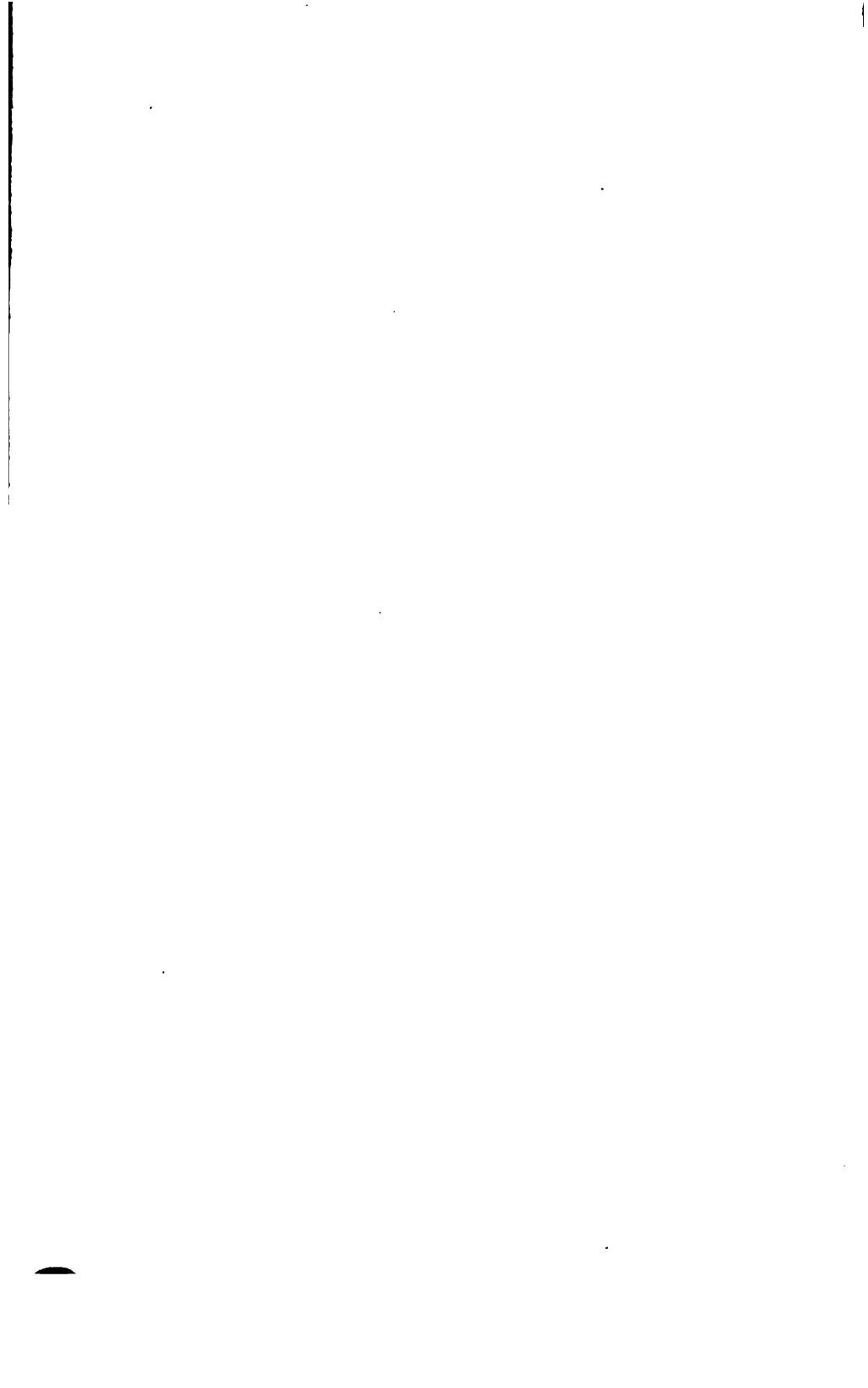
deliver the said *Lewis Levy* into the custody of the keeper of the said gaol, at *Gloucester*, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of *London* are commanded of the goods and chattels, lands and tenements of the said *Lewis Levy*, to levy the said fine, and to have the said sum of money in this Court in three weeks of the *Holy Trinity*, and the like command is given to the sheriff of *Middlesex*, 5,000*l.* Of *Mozeley Woolf*, late of *London*, merchant, for certain conspiracies and misdemeanours, whereof he (with others) is indicted, and by a jury of the country convicted, and his fine on the account aforesaid is taxed by the Court here at 10,000*l.*, and he is sentenced to be imprisoned in the *House of Correction* in *Cold Bath Fields*, in and for the county of *Middlesex*, for the term of two years. And it is ordered, that the Marshal of the *Marshalsea* of this Court, or his deputy, do deliver the said *Mozeley Woolf* into the custody of the keeper of the said *House of Correction* in *Cold Bath Fields*, to be kept in safe custody in execution, and until he shall have paid the said fine. And the sheriffs of *London* are commanded of the goods and chattels, lands and tenements of the said *Mozeley Woolf*, to levy the said fine, and to have the said sum of money in this Court in three weeks of the *Holy Trinity*, and the like command is given to the sheriff of *Middlesex*, 10,000*l.* (*x de u*) as by a constat thereof, under the hand of *Thomas Farrar*, deputy clerk of the foreign estreats of this Court, appears. Which said sums of 5,000*l.* and 10,000*l.*, the said mayor and commonalty and citizens of the said city of *London* claim to belong to them; for that the said *Lewis Levy*, under whose name the said sum of 5,000*l.* in the aforesaid constat demanded, and the said *Mozeley Woolf*, under whose name the said sum of 10,000*l.* in the same constat is particularly demanded, were severally and respectively, at the times when the said fines were so set and imposed upon them by the said

Court of our said lord the king, before the king himself, the resiants of the said mayor and commonalty, and citizens within the said city of *London*; and which said sums of 5,000*l.* and 10,000*l.* the said mayor and commonalty and citizens of the said city of *London* claim to belong to them; for that the said *Lewis Levy* and the said *Mozeley Woolf* were severally and respectively, at the time when the said offence and misdemeanor were committed, in respect whereof the said fines were so set and imposed as aforesaid, resiant within the said city of *London*; and which said sums of 5,000*l.* and 10,000*l.* the said mayor and commonalty, and citizens of the said city of *London*, claim to belong to them; for that the said trespasses, offences, and misdemeanours, in respect whereof the said fines were so set and imposed upon the said *Lewis Levy* and *Mozeley Woolf* as aforesaid, were committed by them the said *Lewis Levy* and *Mozeley Woolf* within the said city of *London*; and also, for that *Henry 6*, late king of *England*. [Here the claim set out the clauses in the charter of the 23 *Henry 6* (a), relating to the administration of justice in the city, and the clause containing the grant of fines, &c. under which the city claimed. The latter clause was in the following words:]—“ And further of his more abundant grace, he did grant to the citizens aforesaid and their successors, all manner of fines, issues forfeited and to be forfeited, redemptions, forfeitures, pains, and amerciaments of and for all manner of matters, causes, and occasions, and all things aforesaid, and whatsoever trespasses, riots, insurrections, offences, misprisions, ex-

(a) Dated 26th October. This charter still exists in the Town Clerk's Office, and is copied in *Liber Albus*. All grants of lands and tenements by *Henry 6* were declared void by a statute passed in the 28th year of his reign; but this grant was confirmed by char-

ter in Parliament, 20 *Hen. 7*; and, doubts still existing, it was confirmed again by subsequent charters, and, lastly, by the general *Insipitimus* of *Charles 2*.—*Norton's Commentaries on the City of London*, p. 281.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

TRINITY TERM, 4 WILL. IV.

TO

HILARY TERM, 5 WILL. IV., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS:

BY

CHARLES CROMPTON, Esq., OF THE INNER TEMPLE,

R. MEESON, Esq., OF THE MIDDLE TEMPLE,

AND

H. ROSCOE, Esq., OF THE INNER TEMPLE,

BARRISTERS AT LAW.

VOL. I.

LONDON:

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1835.

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tortions, usurpations, contempts, and other misdemeanours, done or to be done in the city or suburbs aforesaid, before the mayor, recorder, and aldermen of the city aforesaid for the time being, the justices of him, his heirs, or successors, assigned or to be assigned to hear and determine felonies, trespasses, and misdemeanours in the city aforesaid, or the suburbs thereof, or the justices assigned or to be assigned to hold pleas before the said lord the king, his heirs or successors, the justices of the common bench, the Treasurer and barons of the *Exchequer*, or the barons of the *Exchequer*, or whatsoever other justices and officers of him, his heirs or successors, adjudged or to be adjudged, together with the assessments and levying of the same, as often and when it should be needful. And treasure-trove in the city aforesaid, or the suburbs thereof; and also waifs and strays and goods and chattels of all and singular felons and fugitives, for felonies by them committed or to be committed in the city or suburbs aforesaid, adjudged or to be adjudged before the said king, or his heirs or successors, or any of the justices aforesaid; and all merchandize and victuals which in coming to the city aforesaid to be sold in the said city or the suburbs thereof, and in the water of *Thames*, and elsewhere within the same city, the liberties and suburbs thereof, should be found forestalled or regrated, and which therefrom thenceforth should happen to be forestalled or regrated. And that the said citizens should have all and every thing which should happen to be adjudged by the said mayor, or the justices aforesaid, to be due or to belong to the said king, his heirs, or successors, of or for any recognizances or securities made for good behaviour and observing of the peace before them, or any of them, within the city aforesaid or the suburbs thereof, broken and not observed." [The claim then set forth the statute 1 *Edw.* 4, confirming the liberties and franchises of the city, and then a charter of 20 *Hen.* 7, and that of the

14 *Charles 1.* In the latter charter the clause containing the grant of fines, &c., was as follows:—"And also fines and issues of jurors, and all other issues, fines, and amerciaments forfeited or to be forfeited of and for all manner the matters, causes, and singular the occasions aforesaid, and of and for whatsoever transgressions, riots, offences, misprisions, extortions, usurpations, contempts of laws, violations, and other misdemeanors done or to be committed in the city aforesaid or the liberties of the same, before the mayor, recorder, and aldermen of the same city for the time being, or one or any of them, or any of the justices of the said king, his heirs and successors, concerning the peace in the said city aforesaid, or before the justices of him, his heirs and successors, assigned or to be assigned to hear and determine felonies, transgressions, and misdemeanors in the city aforesaid, or the liberties of the same, or before any justices of him, his heirs or successors, of *Nisi Prius* for trying of things, causes, and matters in the city aforesaid, or other justices of him, his heirs or successors whatsoever, or any of them, in the city aforesaid, judged or to be adjudged forfeited or to be forfeited, together with the assessments and levies of the same, as often and when there should be need, saving nevertheless always and reserving to the said king, his heirs and successors, all and all manner of issues and amerciaments, commonly called fines or issues royal, thereafter from time to time to be imposed upon the mayor, aldermen, and sheriffs of *London* and *Middlesex* for the time being, or one or any of them respectively, or by them to be forfeited and paid." [The claim then set out a charter of 15 *Charles 2*, and concluded as follows:—"As by the said last-mentioned letters patent now produced and shewn to the Court here does more fully appear. Wherefore the said mayor and commonalty and citizens of the city of *London* are, and at the said times when the said fines of 5,000*l.* and 10,000*l.* were set and imposed as aforesaid were;

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a body corporate in deed and name, and persons able in law to plead and to be impleaded, and to challenge, demand, and prosecute all the liberties, privileges, and franchises aforesaid, by the aforesaid name of mayor and commonalty and citizens of the city of *London*. By virtue of all which premises the aforesaid mayor and commonalty and citizens do claim to belong to them the aforesaid sum of 5,000*l.*, so as aforesaid set and imposed by the said Court of our said lord the king before the king himself, upon the said *Lewis Levy*, and the said sum of 10,000*l.*, so as aforesaid set and imposed by the said Court of our said lord the king before the king himself, upon the said *Mozeley Woolf*. Wherefore they pray that their said claim thereto may be allowed, &c."

The replication was in the following form:—And Sir *Thomas Denman*, knight, Attorney-General of our lord the now king, being present here in Court, on behalf of our said lord the king, and having heard the said claim of the said mayor and commonalty and citizens of the city of *London*, of the allowance to them of the said fine of 10,000*l.*, set and imposed upon the said *Mozeley Woolf* as aforesaid, for our said lord the king, says that, notwithstanding any thing by the said mayor and commonalty and citizens above alleged, the said fine of 10,000*l.* ought not to be allowed to them, because the said Attorney-General of our said lord the king, says, that the said *Mozeley Woolf*, under whose name the sum of 10,000*l.* in the aforesaid constat is particularly demanded, was not, at the time when the said fine was so set and imposed upon him by the said Court of our said lord the king, before the king himself at *Westminster*, the resiant of the said mayor and commonalty and citizens within the said city of *London*, as stated in their said claim. And this the said Attorney-General prays may be inquired of by the country, &c. And the said Attorney-General of our said lord the king further says, that the said

Moseley Woolf was not, at the times when the said offence and misdemeanor was committed, in respect whereof the said fine was so set and imposed upon him the said *Moseley Woolf* as aforesaid, resiant within the said city of *London*, as stated in the said claim of the said mayor and commonalty and citizens. And this, he the said Attorney-General prays may be inquired of by the country, &c. And the said Attorney-General of our said lord the king further says, that the said fine of 10,000*l.*, so set and imposed upon the said *Moseley Woolf* as aforesaid, was not a fine, issue forfeited, redemption, forfeiture, pain or amerciament, set or imposed within the said city of *London*, or suburbs or liberties thereof, or by or before the lord mayor, recorder, and aldermen of the said city, or any or either of them; and this the said Attorney-General of our said lord the king is ready to verify; wherefore the said Attorney-General of our said lord the king prays judgment if the said fine of 10,000*l.* ought to be allowed to the said mayor, commonalty, and citizens of the city of *London*.

The rejoinder of the city ran as follows:—And the said mayor and commonalty and citizens of the city of *London*, as to the said replication of the said Attorney-General, by him first above pleaded, and which he hath prayed may be inquired of by the country, do the like. And the said mayor and commonalty and citizens of the city of *London*, as to the said replication of the said Attorney-General by him secondly above pleaded, and which he hath prayed may be inquired of by the country, do the like. And as to the replication of the said Attorney-General, by him lastly above pleaded, the said mayor and commonalty and citizens say, that notwithstanding any thing by the said Attorney-General therein above alleged, the said fine of 10,000*l.* ought to be allowed to them, because they say that the indictment on which the said *Moseley Woolf* was charged (together with others)

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with the said trespasses, offences, and misdemeanors, in respect whereof the said fine of 10,000*l.* was so set and imposed upon the said *Moseley Woolf* as aforesaid, was presented and found by the jurors of our then lord the king of and for the city aforesaid, at the general session of oyer and terminer of our late sovereign lord *George* the Third, holden for the city of *London* at *Justice Hall*, in the *Old Bailey*, within the parish of *St. Sepulchre*, in the Ward of *Farringdon Without*, in *London* aforesaid, on *Wednesday* the 6th day of *May*, in the 58th year of the reign of his said late majesty king *George* the Third, before the then mayor, the then recorder, and certain other aldermen of the said city for the time being; and also before certain justices of his said late majesty king *George* the Third, and others their fellows, justices of our said lord the king, assigned by letters patent of our said lord the then king, made under the great seal of our lord the then king of the United Kingdom of *Great Britain* and *Ireland* to the several justices therein named, and others, or any two or more of them, directed to inquire more fully the truth by the oath of good and lawful men of the city of *London*, and by other ways, means, and methods, by which they should or might better know, (as well within liberties as without), by whom the truth of the matter might be better known of (amongst other things) all confederacies, trespasses, contempts, oppressions, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them, within the city aforesaid, (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them, or any of them, in any manner whatsoever; and the said premises to hear and determine according to the law and custom of *England*; which said indictment his said late

majesty king *George* the Third, afterwards for certain reasons caused to be brought before him to be determined according to the law and custom of *England*. And the said mayor and commonalty and citizens further say, that the said indictment was afterwards tried at the Sittings for *Nisi Prius*, holden for the said city of *London* at the *Guildhall* of and within the said city, before the Right Hon. Sir *Charles Abbott*, Knight, then the Chief Justice of our lord the then king assigned to hold pleas before the king himself, *John Henry Abbott* then being associated to the said Chief Justice; and that the said *Mozeley Woolf* (together with others) was thereupon found guilty of the premises charged upon him in and by the said indictment. And the said mayor and commonalty and citizens further say, that afterwards, in the Court of our lord the king, before the king himself, at *Westminster*, the said *Mozeley Woolf* being brought there into Court in custody of the keeper of his majesty's gaol of *Newgate*, by virtue of a writ of *habeas corpus*, it was adjudged and ordered, in and by the said Court of our lord the king, before the king himself, at *Westminster*, that the said *Mozeley Woolf*, for his offences aforesaid, should pay the said fine of 10,000*l.* to our sovereign lord the king, and should be imprisoned in the *House of Correction* in *Cold Bath Fields*, in and for the county of *Middlesex*, for the term of two years. And it was further ordered by the said Court, that the Marshal of the *Marshalsea* of his majesty's Court of *King's Bench*, or his deputy, should deliver the said *Mozeley Woolf* into the custody of the keeper of the said *House of Correction* in *Cold Bath Fields*, to be kept in safe custody, in execution of the said judgment, until he should have paid the said fine of 10,000*l.* And this they, the said mayor and commonalty and citizens, are ready to verify; wherefore they pray judgment, and that their said claim to the said fine of 10,000*l.* may be allowed to them.

Demurrer and joinder in demurrer.

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Wightman for the Crown.—The question is, whether, by force of the charters of *Henry 6* and *Charles 1*, or either of them, the city is entitled to the fine, upon the ground that the offences were committed within the city by *Moseley Woolf* who was at that time, and also at the time of the imposition of the fine, a resitant within the city. These are the only grounds stated in the claim of the city, and it is upon the validity of that claim, that, in the present state of the pleadings, the Court is called upon to decide. On behalf of the Crown, it is contended that the city ought to have gone further, and to have shewn either that the fine was *adjudged* in the city, or at least that the trial of the indictment was within the city, neither of which facts is alleged. Upon the face of the claim, it appears that the fine was imposed “by the Court of our lord the king before the king himself,” that is to say, by the Court of *King's Bench*, at *Westminster*.

The claim of the city is founded entirely upon the charters, and it is therefore incumbent upon them to bring themselves strictly within the words of those charters; for, in the construction of grants from the Crown, the rule applicable to the grants of the subject, viz. that they are to be taken most strongly *contra proferentem*, is reversed, and they are construed most strictly against the grantee, and nothing will pass to him but by clear and express words. Thus, by a grant from the Crown of the goods and chattels of felons, the goods of a *felo de se* will not pass (a). Again, if the king grants *omnes terras dominicales manerii de W.*, customary lands held by copy, parcel of the manor of *W.*, shall not pass; though it is otherwise in the case of a common person. *Case of Alton Woods* (b). And when the Crown grants all mines, gold and silver mines

(a) *Rex v. Sutton*, 1 Saund. 269; C. pl. 2.
1 Sid. 420; 1 Vent. 32; 2 Keb. (b) 1 Rep. 48.
526, 533; S. C. 2 Roll. Abr. 194,

will not pass. *Case of Mines* (*a*). So, when the king has two manors A. and B., and grants *totum illud manerium de A. et B.*, although, if the grant had been by a subject, both manors would have passed; yet, in the case of the crown, the grant is void (*b*). The same rule of construction is laid down in *Williams v. Berkeley* (*c*), where it is said, that, by the common law, the grant of every person is taken more strongly against himself, and more favourably for a stranger; but that the grant of the king is taken more strongly against a stranger, and more favourably as to the king. It is to be seen, therefore, whether, following this rule, the crown can be held by either or both of these charters to have granted to the city of *London* the fines of persons wheresoever convicted, if they be convicted for offences committed within the city. The charter of *Henry 6* gives all fines, &c. for all manner of causes, &c., done in the city, before the mayor, recorder, and aldermen, (and then it enumerates the other parties), "adjudged or to be adjudged, together with the assessments and levying of the same, as often and when it should be needful, and treasure-trove, in the city aforesaid or the suburbs thereof." It will be contended for the city, that the charter gives the fines imposed by any of the justices enumerated, whether imposed in the city or elsewhere; but the true construction of the charter is, to refer the words "in the city aforesaid," to the word "adjudged," and then the king only grants such fines for offences committed within the city, as before any of the various justices mentioned in the charter are adjudged in the city. [Lord *Lyndhurst*, C. B.—The charter speaks of the Courts at *Westminster*, which are named in their proper order, first, the justices assigned to hold pleas before the king himself, viz. the *King's Bench*; secondly, the justices

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(*a*) *Plowd.* 314 *a*, 336 *b*, 339; 46 *a*.

1 Rep. 46 *b*. (*c*) *Plowd. Com.* 243.

(*b*) *Case of Alton Woods*; 1 Rep.

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of the *Common Bench*, and then the treasurer and barons, or the barons of the *Exchequer*. What is there inconsistent in the city being entitled by the charter to fines adjudged in the Courts at *Westminster*?] If the words of the charter of *Henry 6* be general in their effect, they are restricted by those of the charter of *Charles 1*. That instrument is a regrant of all the privileges of the city, and is as comprehensive and precise in all respects as if it were a charter granted for the first time. It constitutes the mayor, and certain of the aldermen, keepers of the peace of the king within the city; and it assigns the mayor, certain aldermen, and the recorder, to be justices of the king, to inquire concerning all manner of murders, felonies, &c. The granting clause gives all fines &c., for all matters &c., "done or committed in the city aforesaid or the liberties of the same, before the mayor, recorder, and aldermen of the said city for the time being, or one or any of them, or any of the justices of the said king, his heirs and successors, concerning the peace of the city aforesaid, or before the justices of him, his heirs and successors, assigned or to be assigned to hear and determine felonies, transgressions, and misdemeanors in the city aforesaid, or the liberties of the same, or before any justices of him, his heirs, or successors of *Nisi Prius*, for trying of things, causes, and matters in the city aforesaid, or other justices of him, his heirs, or successors whatsoever, or any of them, *in the city aforesaid judged or to be adjudged forfeited* or to be forfeited, together with the assessments and levies of the same, as often and when there should be need." Here at all events the words "in the city aforesaid judged or to be adjudged," apply to the first words of the clause, and mean that all fines, &c. for all offences committed in the city, and before the mayor or other justices, *adjudged* in the city, are to be taken by the city. If this were not the construction, the charter of *Charles 1*, would be a senseless repetition of the charter

of *Henry 6.* In conveyances every restriction has its proper operation, and general words in a grant may be overthrown by words restrictive, provided the restriction conours with the general words of the grant. *Clay v. Barnett* (a).

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Follett, contra.—The principal question is, whether, in order to entitle the city to the fine, it is necessary to shew that it was imposed, or adjudged within the city. The facts are that *Moxeley Woolf* committed the offence within the city; that a true bill was found for that offence at the *Old Bailey*; that the indictment was removed by *certiorari* into the *King's Bench* and tried before the Chief Justice at *Guildhall*, and that the fine was imposed by the Court of *King's Bench*, at *Westminster*. The answer of the crown to the claim of the city is that the fine ought to have been imposed in the city. With regard to the charters, there is no occasion to call in the rule of construction which has been referred to, and which may be admitted to be correct. No doubt whatever can rest upon the construction of the charter of *Henry 6.* It grants all fines for offences committed within the city, before the justices in the charter named “adjudged or to be adjudged.” Now, who are the justices there named? The city magistrates, the commissioners sitting at the *Old Bailey*; and then are enumerated, according to their rank and order, the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*. When these Courts are mentioned, it could not have been intended that the fines adjudged by them should be adjudged in the city of *London*. There is no instance of the *King's Bench* having ever sat there, and the Court of *Common Pleas*, being stationary at *Westminster*, could not have sat in any other place. It is clear, therefore, that the grant is of

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all fines "adjudged," without any reference to the place where they are adjudged, provided they be adjudged by the Courts mentioned in the charter. But it is said, that if the words of the charter of *Henry 6* be sufficiently general to pass all fines to the city wherever adjudged, that generality is restricted by the charter of *Charles 1*; and it is argued, that, unless this be the case, the clause in the latter charter would be an unmeaning repetition of the identical grant in the former. But this is not so: the grants differ in many particulars. The charter of *Charles* grants fines before justices of the peace, which were not given by the charter of *Henry 6*. The former charter gives the fines for offences committed within the city or the *liberties*, the latter for offences committed in the city or *suburbs*, which is a more confined grant. The exception in the charter of *Charles*, reserving to the king all fines or issues royal imposed upon the mayor and sheriffs of *London* and *Middlesex*, shews that it could not have been intended to convey only such fines as were adjudged within the city. The words at the conclusion of the clause, "in the city of *London*," immediately preceding the words, "judged or to be adjudged," are to be read in connexion with the previous words, "other justices of him, his heirs or successors whatsoever, or any of them." Even if any doubt could be raised upon the construction of the charter of *Charles*, it ought not to be allowed to prevail against the clear and unequivocal words of the charter of *Henry 6*. It would carry the rule of construction in favour of the king's grant further than ever yet it has been carried, to set aside the grant in the charter of *Henry 6*, which is perfectly clear, because the construction of the later charter is not clear. There is another point, which it may be proper to bring before the Court, though it is scarcely necessary to do so. By the charter of *Henry 6*, "if it should be charged or commanded to the mayor, recorder, or aldermen afore-

said, or to the sheriffs of the city aforesaid, &c., to certify or send to the king or his heirs, or into any of the Courts of the king, his heirs or successors, any indictment of felonies, trespasses, extortions, or other misdemeanours whatsoever, or any recognizance or security of the peace, before them or any of them taken, made, or found, the king willed that they, or any of them, should not on that account be holden and compelled to certify or send such indictments, recognizances, or securities, but it should be sufficient to return and transmit only the tenors or transcripts of the same, so that they, at the determination and execution to be made in that behalf, might be able freely to proceed, and lawfully and without hurt, as of right and according to the law and custom of the city aforesaid might be done, any mandate, &c. notwithstanding." The record itself therefore remaining in the city, judgment upon that record must virtually be given in the city, although, in point of form, it is pronounced by the Court of *King's Bench* sitting at *Westminster* (a). [Lord Lyndhurst, C. B.—You say that

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(a) The claim to this privilege, on the part of the city, was earlier than the charter of *Henry 6*. In *Hopestill Tylden's case*, Cro. Car. 265, *Noy*, Attorney-General, shewed a record of *E. 43 Edw. 3, rot. 19*, out of the treasury of the *Exchequer*, to the following effect:—

A writ being awarded out of *Chancery* to the mayor and commonalty of *London* to certify an indictment there taken against one *Lumbard*, for engrossing silk, upon the *alias* they made this return:—That by ancient charters, confirmed by Parliament and ancient usage, they had such a privilege that all indictments and proceedings for any cause, unless

felony, should be tried and determined there, and not elsewhere; and thereupon a *pluris* was awarded to return the indictment into *Chancery*, and then they should be there the same day to shew their evidence and charters to maintain their claim.

Upon the ground of the record remaining in the city, it has been held that an amendment may be made, which could not be done where the record itself is removed, for then there is nothing to amend by. Thus, in *Alcock's case*, 1 Sid. 155, it is said that there is a distinction between *London* and other counties, for, if an indictment is certified out of *Lon-*

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judgment *might* have been entered up in the city, not that it was so. Might not the Attorney-General in every case deprive the city of the fine, by removing the indictment, if judgment in the city be necessary?] According to the argument on the other side he might. The city, however, are not compelled to rely upon this latter point. They rest their claim upon the unequivocal words of the charter of *Henry 6*, which they contend are not restricted by the grant in the subsequent charter.

Wightman, in reply.

Lord LYNDHURST, C. B.—I can see nothing inconsistent in the two charters. The words of the charter of *Henry 6* are clear and distinct. In that charter the grant of treasure-trove is interposed between the word “adjudged” and the words “in the city aforesaid or suburbs thereof,” and the latter words apply to the treasure-trove, and not to the adjudication of the fine, which

don, that may be amended on motion, by the original; and the reason is, that by their charter they only certify the tenor of the record, and the record itself remains with them, by which that which is certified may be amended. See also 1 Keble, 252. So, it is laid down by Serjeant *Hawkins*, that although the body of an indictment removed into the *King's Bench* from any inferior Court cannot be amended, yet, if from *London*, it may be amended; because, by the city charter, a tenor only of the record can be removed from thence. Hawk. P. C. b. 2, c. 25, s. 97. See also Id. c. 27, s. 26. *Cusack's case*, Cro. Car. 128.

The practice of returning a transcript only has been discontinued for a long series of years, and now, in all cases, the record itself is removed from *London*, as well as from other places, upon the *certiorari*. This appears from the case of *The King v. Richardson*, 2 Leach, 560, which was an indictment for perjury, removed by the prosecutor by *certiorari* into the *King's Bench*. *Knowlys*, for the prisoner, moved, at the Old Bailey, that as there was now no record before the Court, the prisoner might be discharged. *Buller*, J., said, that when once a prisoner was in custody for an offence, he must find sureties before he could be discharged.

is general, so far as regards the place of adjudication. In the charter of *Charles 1*, the words, "in the city aforesaid," are not to be read in conjunction with the words which follow, "judged or to be adjudged," but are to be connected with the words "justices" in the clause immediately preceding, and restrict the general description of "other justices" to justices *in the city*. Before we finally pronounce our judgment, however, we are desirous of seeing a copy of those parts of the original charters in Latin which relate to this subject.

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Lord LYNDHURST, C. B., afterwards stated that the Court had examined the charters in the original Latin, and that they found no reason to alter the opinion they had before expressed. That it was obvious, from the nature of the Courts before which, according to the words of the charter of *Henry 6*, the fines might be adjudged, amongst which Courts was that of the *Common Pleas*, which could not sit in the city, that the intention was to pass all fines for misdemeanours committed in the city, whether they were adjudged there or elsewhere; and that the charter of *Charles 1* contained nothing inconsistent with this grant.

Judgment for the city.

—

Doe on the Demise of GILLET v. ROE.

Exch. of Pleas.

MANSEL moved to set aside a declaration in ejectment, on the ground of irregularity. The declaration of Easter Term was entitled generally of that term, and began in the usual form—"John Doe, a debtor to our sovereign lord the king, comes before the barons of his majesty's Exchequer, &c.;" and concluded, "to the damage

An action of
ejectment is not
an action within
the rules of
Hilary Term,
3 Will. 4, and
the declaration
must commence
and conclude
in the usual
form.

Each. of Pleas, of the said *John Doe*, of &c., whereby he is the less
able," &c. *Mansel* contended that the declaration ought
to have preserved the form given in the rules of *Michael-*
mas, 3 Will. 4:—"A. B., by E. F., his attorney, com-
plains of C. D., who has been summoned," &c. The
rules order "that *every declaration* shall in future be
intitled," &c. In a late case this Court held the proceed-
ing by *quo minus* to be at an end since the Uniformity
of Process Act (*a*).

PARKE, B.—The rules of *Michaelmas* Term, 3 Will. 4, are rules “agreed upon by the Judges in pursuance of the statute 2 Will. 4, c. 39.” That statute is intitled, “An Act for the Uniformity of Process in *Personal Actions* in his Majesty’s Courts of Law at *Westminster*;” and its provisions only extend to such actions. Ejectment, being a mixed action, does not fall within those provisions, nor, consequently, within the rules which were framed for the purpose of carrying the act into effect.

Rule refused (b).

(a) 2 & 3 Will. 4, c. 39. doubt expressed in *Dowling's*
(b) This decision resolves the Com. Law Pr. 189.

SNELLING v. Lord HUNTINGFIELD.

A., on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff

ASSUMPSIT.—The first count of the declaration stated, that, in consideration that the plaintiff, together with one *Hannah Lincoln*, at the request of the defendant, would become and be the servants of the defendant, to wit,

took the proposals and went away, and entered into *A.*'s service on the 24th of July:—*Held*, that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the 4th section of the Statute of Frauds.

that the plaintiff would become such servant in the capacity of a bailiff, and that the said *H. L.* would become such servant in the capacity of a housekeeper and to manage the dairy and some poultry, and would remain in the service of the defendant, as such servants, for a year then next following, for certain wages, &c. &c., defendant promised plaintiff to employ him in the defendant's service at those wages, and to continue him in such service until the expiration of one year next ensuing. Breach—that the defendant did not continue the plaintiff in his service till the expiration of a year, but discharged him therefrom. The *second* count stated, that, in consideration that the plaintiff, at the request of the defendant, would become servant to the defendant, and would find and provide for a person who should act for the defendant in the capacity of a housekeeper, &c., and would remain and continue in the service of the defendant as such servant, and find, provide for, and pay such person in the capacity aforesaid, for the space of a year then next following, at and for certain wages, to wit, &c., the defendant promised the plaintiff to retain and employ the plaintiff in the defendant's service, and in the capacity aforesaid, at the wages aforesaid, and to continue him in such service and employ until the expiration of one year then next ensuing. Breach—that the defendant did not continue the plaintiff in his service and employ till the expiration of one year from the making of the promise, but refused to permit him to continue, and discharged him therefrom. The declaration also contained an *indebitatus* count for wages and salary as a servant, for goods bargained and sold, and sold and delivered, for work and labour, for money lent, for money paid, for money had and received, and on an account stated. The defendant pleaded *non-assumpsit*, except as to 21*l. 3s.*, parcel of the sums in the *indebitatus* count mentioned, and as to that a tender. He also pleaded (except as to the amount tendered) a set-off for goods sold and delivered,

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Exch. of Pleas, and an account stated. Upon these pleas the plaintiff
1834. took issue.

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The cause was tried at the *London* Sittings in *Trinity* Term, 1833, before *Gurney*, B., when the following appeared to be the facts of the case. On the 20th *July*, 1832, the defendant proposed to hire the plaintiff as a bailiff, and the defendant at that time wrote the following memorandum, (which was signed by neither of the parties), but was delivered to the plaintiff, and by him taken away:—

- “ The pork wanted to be at 5*s.* a stone.
- “ The wheat required at 27*s.* a comb.
- “ The board of two servants at 2*s.* a day.
- “ The person and his daughter, a housekeeper, to do for them and manage the dairy, and some poultry.

“ The person to have the road running through the parks, as the division of the lands to be managed by each bailiff. You take the south side. The salary for bailiff and housekeeper to be 80*l.* a year.

“ All expenses going either to market or sales.”

The plaintiff did not enter the service of the defendant until the 24th *July*. He boarded *three* of the defendant's servants, and claimed on this account, at the trial, a balance of 9*l.* 3*s.* Before the expiration of the year, the defendant, being displeased with the plaintiff, gave him a month's warning to quit his service; and, on the 14th *November*, the defendant's agent settled an account with him respecting the board of the servants, and his own wages, and the plaintiff assented to the account, with the exception of his wages, for which he claimed the full year's amount. The defendant's agent told him that he considered him discharged from that day. On the 6th *December*, 1832, the plaintiff finally quitted the defendant's service; and now claimed damages for not being continued in his service for the remainder of the year. On the part of the defendant, it was ob-

jected that the plaintiff was not entitled to recover on the special counts, the contract being made on the 20th *July*, to serve from the 24th for a year, and that not being in writing and signed, no action could be maintained upon it, under the 4th section of the Statute of Frauds; and *Bracegirdle v. Heald* (a) was cited. With regard to the claim for the board of the servants, it was objected that there was no *indebitatus* count applicable to that demand. No question ultimately arose either as to the tender or set-off. The learned Judge reserved the point, and left the case to the jury, telling them, that, although the plaintiff was to come into the service of the defendant on the 24th, he had some doubts whether that was the day on which the plaintiff's service commenced; that if it commenced on the day of the making of the contract, it might have been completed within the year; but that it was for the jury to say whether the special counts were proved or not. That, with regard to the demand for board, the jury would say whether there was any thing due to the plaintiff after the 14th *November*. The jury found for the plaintiff, with 60*l.* damages for the wages for the remainder of the year, and 3*l.* for the board of the servants after the 14th *November*. In *Trinity Term, 1833*, *Law* obtained a rule to shew cause why the verdict should not be set aside, and a verdict for the defendant or a nonsuit be entered, or for a new trial, upon the ground (amongst others) that the agreement was void by the Statute of Frauds, and that there was no evidence to support the 3rd count.

Bompas, Serjt., and Platt shewed cause.—*First*, With regard to the claim for damages for the plaintiff's not being continued in the service of the defendant for the whole year, there was sufficient evidence to support the special

(a) 1 B. & A. 722.

Exch. of Pleas,
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Exch. of Pleas, counts, and the finding of the jury was correct. There
 1834. was nothing to shew that the contract as to the hiring was entered into on the 20th *July*. The parties met, and proposals were made, and the plaintiff took away with him the memorandum written by the defendant; but the contract was not assented to by the plaintiff, nor completed until the 24th *July*, when he expressed his assent to it, by entering into the defendant's service. That contract was upon the terms of the memorandum which were incorporated in it, in the same manner as where a tenant enters upon premises under a lease void by the Statute of Frauds; in which case it has been held that he becomes tenant from year to year, under the terms specified in the void lease (*a*). The contract of hiring was an implied contract, arising out of the circumstance of the plaintiff coming into the defendant's service on the 24th *July*, subject to the terms of the memorandum of the 20th, so far as these terms were applicable to the circumstances of the case. That the contract between the parties was not that contained in the memorandum appears from this circumstance, that the plaintiff boarded *three*, and not *two* of the defendant's servants, as specified in the writing. The plaintiff was retained as a bailiff in husbandry; and, with regard to such servants, the presumption of law is, that a general hiring is a hiring for a year (*b*). Such has been the invariable construction of similar contracts in settlement cases (*c*); and it is not competent to the master in those cases to terminate the service by a month's notice, as may be done in the case of domestic servants (*d*). It is

(*a*) *Doe v. Bell*, 5 T. R. 171.

(*b*) See *Earl of Mansfield v. Scott*, 1 Clark & Finelly, 319.

(*c*) *Rex v. Wincaunton, Burr. S. C.* 299; 2 Bott, 195; 1 Nol. P. L. 367; 4 Burn, 352.

(*d*) "In domestic service there is a common understanding that

such contracts may be dissolved, at a month's warning or a month's wages. There does not appear to be any such understanding with regard to servants in husbandry."

Per Gaseke, J. Beeston v. Collyer, 4 Bing. 313; S. C. 2 C. & P. 607.

clear, therefore, that there was a contract for a year; and if, supposing the contract to have been made on the 20th *July*, it was void by the Statute of Frauds, a fresh implied contract arises on the 24th, when the plaintiff entered into the defendant's service. [Alderson, B.—Will the law presume such a contract as that set forth in the special counts of the declaration?] The law will presume a contract for a year's service, on the terms of the defendant's memorandum or proposal. With regard to the second point, there certainly is no count for boarding the defendant's servants; but it is impossible that the plaintiff can have boarded them, without purchasing the necessary articles, and he may, therefore, recover under that part of the third count, where a claim is made for money paid, and for goods sold and delivered.

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Law and Chilton, contra, were stopped by the Court.

Lord LYNDHURST, C. B.—The first point arises upon the special counts, under which the plaintiff seeks to recover damages against the defendant, upon a contract to continue him in his service for a year. Then the question is, at what time that contract was made; for if it was made on the 20th of *July*, and was for a year's service, to commence on the 24th, it was a contract not to be performed within the year, upon which, by the 4th section of the Statute of Frauds, no action could be maintained, being “an agreement not to be performed within the space of one year from the making thereof.” *Bracegirdle v. Heald* (a). The plaintiff apparently assents to the proposals made on the 20th, takes the writing with him, and enters into the service of the defendant on the 24th. Then, if there was a contract in fact upon the 20th, al-

(a) 1 B. & A. 722.

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though, by the Statute of Frauds, no action can be brought upon it, how can another contract be implied (*a*)? It is not like the case of a demand for services rendered; it is a claim for damages against the defendant for not continuing the plaintiff for the year, and a contract of hiring for a year must be proved. Upon this part of the case, therefore, the defendant is entitled to have the rule for a nonsuit made absolute.

The rest of the Court concurring, the rule was made absolute, the defendant undertaking to pay the *3l.* to the plaintiff for the board of the servants, and the plaintiff undertaking not to bring a fresh action (*b*).

(*a*) See *Cook v. Jennings*, 7 T. R. 381; *Grimman v. Legge*, 4 B. & C. 326.

(*b*) See *Gandell v. Pontigny*, 4 Campb. 378; 1 Stark. 98; recognizized in *Collins v. Price*, 5 Bing. 132; 2 Moore & Payne, 233, S. C., which, it should seem from the present case, cannot be supported.



FRANCIS KNOWLES, Assignee of SAMUEL WILSON and JAMES HARMER, Esquires, v. DAVID STEVENS.

It is no plea to debt on bail-bond, that there was no affidavit of debt filed in the action against the principal.

Since the rules of H. T. 4 Will. 4, a plea must conclude with a verification, or to the country.

THIS was an action of debt on a bail-bond, brought by the plaintiff, as assignee of the sheriff of Middlesex. The declaration was in the usual form. The plea was as follows:—"And the defendant, by *John Dicas*, his attorney, says, that, before the suing out of the writ of *capias* in the declaration mentioned, there was no affidavit of the plaintiff's cause of action, as required by the statutes in such case made, filed in this Court (*a*)."
To this plea the plain-

(*a*) See a similar form, 3 Chitty's Pl. 488.

tiff demurred specially, and assigned the following as causes of demurrer:—That the said matters pleaded in the said plea, as to the sufficiency of the affidavit of the cause of action, as required by the statutes in such case to be made, filed in this Court, is a matter of law for the decision of the Court, and not for a jury; and such matters should not be left to a jury; and the said plea should have been framed so as to have referred the matters therein stated to the Court; and also, for that the said plea consists altogether of matter of law; and also, for that the matters pleaded in the said plea, by way of defence, cannot be so pleaded; and also, for that the said plea has no conclusion whatever, either to the country, or with a verification, and has no proper conclusion. Joinder in demurrer.

Erie appeared for the plaintiff, but the Court called upon *Mansel* to support the plea.

Mansel.—There are two questions—*first*, whether, in form, the plea is correct; *secondly*, whether, in substance, it is an answer to the declaration. *First*, the form of the plea is correct. By rule 9 of *Hilary Term, 4 Will 4*, in a plea or subsequent pleading intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment. This being a negative plea, no verification was necessary. *Millner v. Crow dall* (*a*). *Secondly*, with regard to the substance of the plea, it shews a sufficient answer to the action. The plea is analogous to that pleaded by bail, that there was no writ of *ca. sa.* duly issued and prosecuted against the principal (*b*). The matter put in issue is not matter of law, but of fact, whether there was *any* affidavit. This case differs materially from that of *Hume v. Liversedge* (*c*), where the de-

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(*a*) 1 Shover, 338.

(*c*) 1 Cromp. & Mee. 332; 1

(*b*) Chitty's Pl. Vol. 2, p. 520, Dowl. Pr. Cas. 660, S. C.
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defendant pleaded "that no *proper* affidavit of the cause of action to the amount of the said sum was ever made or filed of record," &c. There the Court held, that no proper or certain issue could be taken on the plea, because it was uncertain what was meant by a *proper* affidavit. But they said that the defendant might have pleaded that there was no affidavit, except &c. This shews that the present plea is good. The proper course for the plaintiff was to reply that there was such an agreement, and to set it out *in hæc verba*. *Lowe v. Eldred* (a). Although it was not necessary for the plaintiff to allege an affidavit in his declaration, yet it is clear, from the various statutes, that the want of such affidavit is an answer to this action. By the 12 *Geo. 1.*, c. 29, s. 2, where the plaintiff's cause of action shall amount to the sum of 10*l.* or upwards, an affidavit shall be made and filed of the cause of action, and if any writ or process shall issue for the said sum of 10*l.* or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff shall not proceed to arrest the body of the defendant. The statute 7 & 8 *Geo. 4.*, c. 71, s. 1, makes the proceedings and judgments had on the writ or process not conformable to the requisitions of that statute void and of no effect. He also referred to the Statute of Bail-bonds, 23 *Hen. 6.*, c. 9, and the 4 *Ann.* c. 16, s. 20.

Lord LYNDHURST, C. B.—The plea appears to me to be bad. If by accident the affidavit be not filed, it could not be intended that the neglect of the officer should vitiate all the proceedings. It is, therefore, not sufficient to aver that there was no affidavit *filed*. Upon the other point, it is clear that there ought to have been a conclusion to the plea.

ALDERSON, B.—The words of the stat. 12 *Geo. 1.*, are,

(a) 1 *Cromp. & Mee.* 239.

"That if, after the 24th June, 1726, any writ or process shall issue for the sum of 10*l.* or upwards, and no affidavit shall be *made* as aforesaid, the plaintiff shall not proceed," &c. The statute does not say "made and filed." To have raised the question upon this act, the defendant ought to have averred that there was no affidavit *made*. The plea is also bad, as wanting a conclusion.

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The rest of the Court concurring, there was—

Judgment for the plaintiff.

CLARKE and Ux. v. WEBB and Another.

ASSUMPSIT for use and occupation, and also for money had and received, and upon an account stated. Plea—the general issue. This case was tried at the *Surrey Spring Assizes*, in the present year, before Lord *Lyndhurst*, C. B., when the following facts were proved:—A person named *Lawrence*, being tenant of a house belonging to Mrs. *Clarke*, at the rent of 28*l. per annum*, the sum of 7*l.* became due from him for one quarter's rent on 23rd *March*, 1833. *Lawrence*, having become insolvent, filed his schedule in the Insolvent Court in the month of *June*, and the defendants were appointed assignees of his estate. By their directions, certain fixtures belonging to *Lawrence* were removed from the premises, and sold. The evidence did not establish any occupation of the premises by the defendants; but it was proved, that, in consideration of being allowed to remove the fixtures, they promised to pay the plaintiffs 7*l.* for the quarter's rent, which became due on *Midsummer-day*. The plaintiffs claimed to recover this sum on the count on an account stated. The

The assignees of an insolvent tenant agreed to pay to the landlord 7*l.* for the last quarter's rent:—
Held, that the sum could not be recovered on the count upon an account stated, there having been no use and occupation by the defendants.

Exch. of Pleas, learned Chief Baron told the jury, that, if they thought the
1834. agreement proved, they had better find for the plaintiffs; and a verdict was accordingly found for the plaintiffs, damages 7*l.* His Lordship having given leave to the defendants to move to set aside the verdict for the plaintiffs, and to enter a nonsuit, *Thesiger* had obtained a rule to that effect, and now—

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Platt shewed cause.—Where a special agreement has been executed, it is not necessary to declare upon it; but *indebitatus assumpsit* may be maintained upon the duty arising out of the performance of the special contract. Here, the rent had become due, and the occupation was complete; and it was not necessary to call in the assistance of the statute 11 *Geo. 2.* [Lord *Lyndhurst*, C. B.—There was no occupation by the defendants proved.] There was an agreement to pay 7*l.* By virtue of that agreement, the money had become due, and might be recovered under the account stated.

Lord LYNDHURST, C. B.—The promise was a distinct and separate contract to pay 7*l.*; and a special agreement to pay a sum of money cannot be converted into an account stated. In order to recover as upon an account stated, it ought to appear that the account was stated with reference to former transactions between the parties. The rule must be made absolute.

Rule absolute.

Thesiger was to have supported the rule.

REEVE v. BIRD.

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1834.

ASSUMPSIT for not keeping a certain messuage and other premises in tenantable repair. There was also a count for use and occupation, money paid, &c. The defendant pleaded the general issue.

At the trial before *Denman*, C. J., at the last assizes for the county of *Cambridge*, the following facts were proved : On the 17th of *June*, 1826, the plaintiff, the owner of the premises in question, and the defendant, entered into the following agreement :—“ Articles of agreement made, concluded, and agreed upon, this 17th day of *June*, in the year of our Lord 1826, between *John Reeve*, of the town of *Cambridge*, in the county of *Cambridge*, surgeon, of the one part, and *William Bird*, of the same place, inn-keeper of the other part. The said *John Reeve*, for and in consideration of the yearly rent, and the performance of the conditions and agreements hereinafter mentioned, hath agreed to let unto the said *Wm. Bird* all that messuage or tenement, with the cottages, stable-yard, and garden thereto belonging, situate in *King-street*, in the said town of *Cambridge*, as the same are now occupied by — *Faulkner* and others; to hold the said premises, with the appurtenances, unto the said *Wm. Bird*, his executors and administrators, from the 25th day of this instant *June*, unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended, at and under the yearly rent of 90*l.*, to be paid half-yearly, that is to say, on *Midsummer-day* and *Christmas-day* in every year during the said term; the said *John Reeve* to pay the ground rent, and the land tax, the above-mentioned premises being leasehold under *Jesus College*. And the said *John Reeve*, also agrees to erect and build a substantial shed in the yard of the said premises forthwith. And the said *William Bird*, for himself, his executors and ad-

A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to *B.* for the remainder of the term, the house and cottages being in the possession of under-tenants, and the stable and yard in that of *A.* The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. *B.* took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. *A.* paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold :—*Held*, that this was a surrender by operation of law of all the premises.

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ministrators, doth hereby agree to hire the said premises of the said *John Reeve* upon the terms aforesaid, and to pay the said rent of 90*l.* by equal half-yearly payments on the days hereinbefore mentioned for payment thereof, and to pay all and all manner of rates, taxes, charges, assessments and impositions whatsoever, except the ground rent and land tax, which may be rated, taxed, assessed, or imposed on the said premises, or on the said *John Reeve* in respect thereof, during the said term; and to keep the internal and external parts of the said premises in good and substantial repair, and so to leave the same, with all buildings and improvements which the said *William Bird* may erect thereon, at the end or expiration of this agreement, without any allowance for the same. In witness," &c. The premises demised by the above agreement consisted of a dwelling-house, three cottages, and a stable and yard. The defendant himself, after the demise, only occupied the stable and yard; the dwelling-house was occupied by a person named *Prince*, and the three cottages by different tenants. The defendant continued to pay rent for the whole premises down to the month of *January*, 1832, when, becoming embarrassed in his circumstances, he agreed to assign the premises to a person named *Bullock*. At this time the defendant paid to the plaintiff the rent due at the *Christmas* preceding, together with a sum of 4*l.* 10*s.*, intended to cover the period during which he continued tenant, before the assignment to *Bullock*. *Prince* remained in the occupation of the dwelling-house; but the tenants of two of the cottages leaving them in the course of the year 1832, *Harris*, who acted as agent to the plaintiff, let those two cottages to new tenants. In the course of the year 1832, and after the assignment to *Bullock*, rent for the house and cottages was received by the plaintiff from the persons occupying them; and receipts were given in the following form:—

" Received, 23rd *January*, 1833, of Mr. *Prince*, the sum of nineteen pounds, sixteen shillings, and eight pence;

being one year's rent of premises in *King-street*, held of
Mr. John Reeve, due *Christmas* last, (less three shillings
and four pence gaol rate).

"Chas. P. Harris."

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"Received, December, 1832, of Mrs. Pledger, three
pounds ten shillings for half a year's rent, due *Midsum-
mer*, for Mr. Reeve's house in *King-street*.

"£3 : 10s.

"Chas. P. Harris."

"Received, 15th *January*, 1833, of Mrs. Pledger, the
sum of three pounds ten shillings, being half a year's
rent of premises in *King-street*, held of Mr. Reeve, due
Christmas last.

"£3 : 10s.

"Chas. P. Harris."

In the month of *August*, 1832, the premises were ad-
vertised, by direction of the plaintiff, "to be let on lease,
or to be sold by private contract." The advertisement did
not state that the premises were in the possession of a
tenant, nor was any time for giving possession mentioned
in it. There was no evidence of the premises being out
of repair previous to the month of *January*, 1832. Upon
this state of facts the counsel for the defendant submit-
ted that there had been a surrender of the premises in
January, 1832; and that, as there was no evidence of
want of repair up to that time, or of any rent being
then due, the plaintiff ought to be nonsuited. The
Chief Justice was of opinion that there had been a sur-
render of the premises; that there was no evidence of
want of repairs before the surrender, and said that there
was nothing to leave to the jury. The plaintiff was
therefore nonsuited, with liberty to move, to set aside the
nonsuit, and enter a verdict for the sum of 81*l.* 8*s.*, or
for a new trial. No objection was made, on behalf of the
plaintiff, to the nonsuit; nor was the Chief Justice re-
quested to leave the fact of surrender as a question for

Esch. of Pleas, the jury. A rule having been accordingly obtained in
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Biggs Andrews now shewed cause.—The nonsuit was right. At the time of the action brought the term had been surrendered, and nothing was due either by way of damages for want of repairs, or for rent. In *January*, 1832, the defendant paid the rent up to the last half-yearly day, and also an additional sum for the period before his assignment; and the acceptance of that sum by the plaintiff is strong evidence of the surrender and of his assent to it. From that period the defendant was neither called upon, nor did he in fact pay any further rent for any part of the premises; but the plaintiff accepted *Bullock* as his tenant, and received the rent from him. It is clear, therefore, that, with regard to the stable and yard, of which *Bullock* took actual possession, there was a surrender by operation of law; and the contract of demise being entire, a surrender of part is a surrender of the whole. Besides, with regard to the remainder of the premises, there is clear evidence of a surrender. Not only did the plaintiff receive the rents from Mr. *Prince*, the tenant of the house, and from the tenants of the cottages, as rent due upon a holding by them under himself; but, upon two of the cottages becoming vacant during the supposed continuance of the seven years' term, the agent of the plaintiff let those cottages to new tenants—an act entirely inconsistent with the continuance of the term. Again, in the month of *August*, in the same year, the plaintiff advertised the whole of the premises to be either let or sold, treating them as altogether in his own possession (*a*). The acts of the plaintiff were not equivocal acts, as in *Redpath v. Roberts* (*b*), where, on the tenant's quitting in the middle of a quarter,

(*a*) In *Doe v. Johnston*, M'Clel. & Y. 141, the premises were actually put up to auction by the landlord, but this was not held to be evidence of a surrender.

(*b*) 3 Esp. N. P. C. 225.

the landlord had put up a bill in the window, and endeavoured to let the premises; and Lord Kenyon said, that it was for the benefit of the tenant that the premises should be let, and that he would not infer from that circumstance that the contract was put an end to. Here, the acts of the landlord were wholly inconsistent with the continuance of the contract. The present is a stronger case in favour of a surrender than that of *Thomas v. Cook* (*a*), where the landlord took a bill of exchange for the rent from the under-tenant, saying he would have nothing further to do with the tenant, and afterwards distrained the goods of the under-tenant for rent arrear, and it was held a surrender. Here, there was a complete change of the possession by the landlord's recognition of other persons as his tenants, and by his dealing with the premises in a manner inconsistent with the continuance of the defendant's title.

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Kelly and Palmer, contra.—With the exception of letting the cottages, there was no act done by the plaintiff which could be construed even into evidence of an acceptance of a surrender. No surrender by operation of law could take place without the assent of the landlord to the change of possession; and it does not appear, that, at the time of the assignment to *Bullock*, and of the latter taking possession of the stable and yard, the plaintiff was aware of those facts. The words of the receipts are equivocal, and do not amount to evidence of an acceptance of the persons paying the money as tenants. Nor was the circumstance of advertising the premises for lease or sale any proof of a surrender, or inconsistent with the continuing title of the tenant. The landlord had the right of disposing of the reversion; and no time was specified in the

(*a*) 2 B. & Ald. 119. See the observations of *Bayley*, J., in *Johnstone v. Huddleston*, 4 B. & C. 932, 7 Dow. & Ry. 411, S. C.; see also *Walls v. Acheson*, 3 Bing. 462, 11 J. B. Moore, 379, S. C.

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advertisement for delivering possession. The letting of the cottages was merely an equivocal act, which might be done either for the benefit of the landlord, or of the tenant (*a*); and it ought to have been left to the jury to say whether or not there had been any change of the possession with the assent of the plaintiff, and any acceptance by him of a new tenant. [*Parke, B.*—Was any request made to the Lord Chief Justice to leave the question of acceptance to the jury?] There was not. His Lordship said, that there was nothing to leave. At all events, there was no surrender of the whole of the premises. Supposing that the plaintiff accepted *Bullock* as the tenant of that part of the premises of which he entered into the occupation, yet the defendant continued to occupy the remainder by his under-tenants as before; and it was ruled by *Dallas, C. J.*, that, although, after an eviction from part, the landlord cannot recover upon the original contract, and the tenant by giving up possession of the remainder is entirely discharged, yet that, if the tenant after the eviction continues in possession of the residue, he may be liable upon a *quantum meruit*. *Stokes v. Cooper* (*b*). [*Parke, B.*—That decision is at variance with the older authorities. The distinction is between an eviction by the landlord and an eviction by a stranger (*c*). The main

(*a*) Where the evidence of the acceptance of the surrender was, that, after the tenant's quitting, the landlord had ordered a fire to be lighted in the kitchen, and a hare to be roasted at it, *Abbott, C. J.*, said—"If a landlord, while his tenant is in the possession and use of apartments, enters and uses such premises, or any part of them, that will deprive him of his claim to rent. But here, the tenant had left the apartments vacant; and as it was proper that fires should be lighted in them, I do not think that the plaintiff's

lighting such a fire, or even making some use of it when he had lighted it, is a sufficient taking possession of the premises to deprive him of his right to rent." *Griffith v. Hodges*, 1 C. & P. 419.

(*b*) Cited in a note to *Smith v. Raleigh*, 3 Camp. 514. See *Tomlinson v. Day*, 2 Bro. & Bing. 681; 5 J. B. Moore, 565, S. C.

(*c*) The doctrine of eviction does not appear to be applicable to the circumstances of this case. The question was, whether a surrender in law of *part* of the premises was a surrender in law of

question in this case, however, is, whether there was not abundant evidence to shew that the plaintiff, with the assent of the defendant, let the premises to other persons. The plaintiff seems to have acquiesced in the ruling of the Chief Justice at the trial.]

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ALDERSON, B. (a)—I am of opinion that the rule ought to be discharged. There is no doubt that the defendant had a right to have the case presented to the jury. It was stated on the part of the plaintiff, that the Lord Chief Justice said there was nothing for the jury, and directed a non-suit. Now, if the point had been distinctly presented to

the whole, so as to prevent the rent from being apportioned. It is laid down, that, if a man leases for life, or years, reserving a rent, and, after, the lessee surrenders part of the lands to the lessor, the rent shall be apportioned. 1 Roll. Ab. 235, citing Co. Litt. 148. Vin. Ab., tit. "Apportionment," (B.) pl. 12. The distinction between an entry on eviction, and an entry on surrender, is thus stated in Co. Litt. 148.b.:—"Where our books speak of an apportionment, where a lessor enters upon a lessee in part, they are to be understood, where the lessor enters lawfully, as upon a surrender, forfeiture, or the like, where the rent is lawfully extinct in part." So, where a man who has a rent-service purchases part of the land out of which the rent issues, it is not extinguished, but shall be apportioned according to the value of the land. Gilb. Rents, 151; Bac. Ab. Rent (M). In order to constitute a surrender of the term by operation of law, it must appear that there was a change in the possession of the premises; but it

is sufficient if the possession is yielded up either to the landlord, or to any other person on his behalf. See *Johnstone v. Huddleston*, 4 B. & C. 939—*Per Holroyd, J.* In *Thomas v. Cook*, 2 B. & A. 119, the possession was delivered up to another person. In *Whitehead v. Clifford*, 5 Taunt. 518, and in *Grimman v. Legge*, 8 B. & C. 324, 2 Mann. & Ryl. 438, S. C., the possession was delivered to the landlord himself, by giving up the key to him. In *Mollett v. Brayne*, 2 Camph. 103, the landlord did not re-enter until after a new year had begun. See *Manning's* note of the case, 2 Mann. & Ryl. 439. In *Stone v. Whiting*, 2 Stark. 235, *Holroyd, J.*, thought that an agreement between landlord and tenant, that the latter should quit and another person be substituted as tenant, was a surrender by operation of law; but it seems, from recent determinations, that this would not be sufficient without a change of possession.

(a) Mr. Baron Parke had left the Court for chambers.

Exch. of Pleas, him, and he had declined to leave it to the jury, there
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ought to have been a new trial. Taking the circumstances separately, the case is open to the observations which have been made; but when we look at the whole of the case, we find that a payment was made by the defendant, and accepted by the plaintiff, for rent up to the 3rd *February*, the middle of a quarter; that the plaintiff let part of the premises; and that the whole were advertised by the plaintiff's agent to be let or sold! Under all these circumstances, the question is, whether the plaintiff did not accept another person as his tenant; and whether there was not, consequently, a surrender by operation of law. If the question had been left to the jury, they could hardly have entertained any doubt, and that is what I understand the Chief Justice, in substance, to have stated to the Jury.

GURNEY, B., concurred.

Rule discharged,

BATE v. KINSEY.

In debt for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney was called by his client to prove the execution of a deed. On cross-examination he admitted that there had been another deed between the same parties, relating to the demised premises, executed after the former, and that he had that deed in Court; but he refused to produce it, relying on his privilege. The defendant then offered to produce parol evidence of the contents of the deed, (without stating what evidence). No notice to produce had been given:—*Held*, that parol evidence was rightly rejected.

plaintiff, in order to prove the execution of the indenture stated in the first count of the declaration, called his own attorney, *Harper*, who, on his cross-examination, stated, that there being some doubt with regard to the title of *Rowland*, (who conveyed to the plaintiff), it was agreed, after the conveyance, that the opinion of Mr. *Preston* the conveyancer should be taken upon the point, and that, if that opinion was in favour of *Rowland's* title, an additional consideration should be paid, and a further conveyance executed. He stated that such further conveyance was executed, and he admitted that he had it in his possession in Court, but objected to the production of it, upon the ground, that, as attorney for the plaintiff, he was not compellable to produce his title deeds. No notice to produce the deed had been given. *Lloyd*, for the defendant, insisted, that he was entitled to give parol evidence of its contents; but the learned Baron ruled that it was not competent to him to give such evidence. *Lloyd* did not address the jury. In *Easter Term*, a rule was obtained to shew cause why the verdict for the plaintiff should not be set aside and a nonsuit entered; but, upon the case coming on for argument, the Court said that there could be no ground for entering a nonsuit, but that the case ought to be treated as an application for a new trial.

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John Evans, and *J. Jervis*, now shewed cause.—It is difficult to understand the nature of this objection. Nothing appeared on the evidence of *Harper*, but that, in *January*, 1833, there was a second deed between the same parties as those in the first deed, relating to the same premises, but what the nature or effect of the second conveyance was did not appear. They were then stopped by the Court, who called upon

Lloyd and *Welsby*, in support of the rule.—The plaintiff's attorney, being called to prove the first deed, was examined on behalf of the defendant with regard to the con-

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sideration of that deed, and, in consequence of those inquiries, the fact with regard to the execution of a second conveyance transpired. It appeared that he had that second conveyance in Court, and, as he refused to produce it, the defendant was entitled to go into secondary evidence of its contents. [Lord *Lyndhurst*, C. B.—Was the defendant prepared with secondary evidence, independently of the testimony of Mr. *Harper*?] It was not necessary to state the particular nature of the secondary evidence with which the defendant was prepared. In *Edwards v. Buchanan* (a), no question was put with regard to the nature of the parol evidence proposed. The learned Judge rejected secondary evidence generally, and not the evidence of the attorney merely. This is precisely the case of *Roe v. Harvey* (b), which has never yet been overruled, though its authority has been doubted by Mr. *Phillips*, but simply on the ground that in that case no notice to produce had been given (c). It is objected

(a) 3 B. & Adol. 878.

(b) 4 Burr. 2484.

(c) 1 Phill. Ev. 425, 6th edit. The following are the observations with which Mr. *Phillips* closes his statement of the case of *Roe v. Harvey*.—“Upon this case it may be observed, that the fact of *Haldane*’s having conveyed away all his interest to *Terry*, seems to have been assumed as satisfactorily proved; but, from the opinion of Mr. Justice *Yates*, which seems to be the better opinion, it may be collected that there was no legal proof of any conveyance of title out of *Haldane*, and that the answer of the witness, upon which the defendant’s argument rested, was as inadmissible in evidence on the cross-examination, as it would have been on an exa-

mination in chief. The true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original; and it does not appear to be a sufficient answer to say that the deed is in Court; for, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference which the production of the deed might have raised against him.”

Though Lord *Mansfield* expressly stated that the want of notice was no objection, yet both Mr. Justice *Yates* and Mr. Justice *Willes* seem to have considered a notice to produce necessary. The former says, “No man can be obliged to produce evidence against himself”

that the defendant was not entitled to give secondary evidence of the contents of the deed, unless a notice to produce that deed had been previously served. The same objection was made in *Roe v. Harvey*, and over-ruled. Lord *Mansfield* there says, "The want of notice was no objection, because they had the deed in Court." [Lord *Lyndhurst*, C. B.—You might have addressed the jury upon the presumption arising against the plaintiff from the refusal to produce the deed, according to the opinion of Lord *Mansfield* in *Roe v. Harvey*, where he says that the refusal is a strong presumption to the jury] (a). The learned Baron having given his opinion, the counsel for the defendant did not think it proper to address the jury. In *Bevan v. Waters* (b), a case is mentioned by *Best*, C. J., which is a strong authority for the defendant. The de-

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The only consequence of *notice to produce* it, would have been the admitting inferior evidence." Mr. Justice *Willes* says, "It is reasonable, that, if the party is in possession of a deed, and refuses (*after proper notice*) to produce it, the other side should be admitted to prove the contents by inferior evidence." The very point, with regard to the notice, was ruled by Lord *Ellenborough*, in the case of *Doe d. Warne v. Grey*, 1 Stark. N. P. C. 283. The notice to produce having been held insufficient, it was proved that the defendant's attorney had that morning, in the Hall, admitted that he had the lease in question with him. *Scarlett*, for the defendant, objected to the receiving parol evidence, on the ground of this admission, and cited the case of *Exall v. Partridge*, where Mr. *Erskine* asked the wit-

ness whether he had not the lease with him. The witness said that he had it in his pocket, but Lord *Kenyon* told him that he need not produce it; and that it was incumbent on the other party to give notice in time, in order to give an opportunity to produce the attesting witness. Lord *Ellenborough* was of opinion that the evidence was inadmissible, the defendant not having received proper notice.

(a) This appears to differ from the case of a witness refusing to answer a question tending to degrade him, as to which see *Watson's case*, 2 Stark. 153, 157; *Roe v. Blakemore*, Ry. & Moo. 384; *Lloyd v. Passingham*, 11 Ves. 64; and the note of the Reporters, Ry. & Moo. 385.

(b) *Moody & Malk.* 236.

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defendant's attorney, in *Bevan v. Waters*, was called upon to produce a letter in his possession; and, upon objection made that this would be a violation of the rule as to privileged communications, *Best*, C. J., said that he recollects that Lord *Mansfield* had decided that an attorney was bound to answer the question; the object was to let in secondary evidence in case it was not produced, and therefore he thought the question ought to be answered. So, in a recent case on the *Oxford* circuit (*a*) secondary evidence was admitted, and it does not appear that any notice to produce was given. [*Gurney*, B.—That case was tried before me, and there certainly was a notice to produce given. Lord *Lyndhurst*, C. B.—In *Cooke v. Hearne* (*b*), it was ruled by Mr. Justice *Patteson*, that the defendant's attorney could not be asked by the plaintiff's counsel, whether he had not the rule for payment of money into Court in his possession, (no notice to produce having been given); and the Court of *King's Bench* held afterwards that such ruling was correct.] That case was mentioned in moving for this rule, and the Court then agreed that it did not apply. Either party might have produced the rule for payment of money into Court. But, supposing that the defendant was not entitled to put any questions to Mr. *Harper* respecting the contents of the deed, or that he could not give secondary evidence on account of the want of a notice to produce, yet sufficient evidence transpired to shew that the plaintiff was not entitled to maintain this action, and though the defendant could not have compelled Mr. *Harper* to make the disclosures which he did, yet, being made, they may be taken advantage of by the defendant, in the same manner as if he had been entitled to demand them. Now, it appeared from Mr. *Harper's* evidence that there was a second conveyance of this property; and this, at all events, threw so much doubt upon the title of the plaintiff, as,

(*a*) *Cox v. Nash.*

(*b*) 1 Moo. & Rob. 201.

under the authority of *Roe v. Harvey*, to call upon him ^{Exch. of Pleas,} to explain it by the production of the second deed. ^{1834.}

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Lord LYNDHURST, C.B.—It appears to me that we ought not to grant a new trial in this case. The effect of the evidence is this, that, in *January*, 1833, some other deed relating to the property in question was executed by the same parties, but there was no evidence of the contents of that deed. It might have been a confirmation of the previous conveyance, for any thing that appears upon the evidence to the contrary. But, it is said, that the deed was in Court, and that parol evidence of its contents ought to have been admitted. It is not, however, even suggested that the defendant was prepared with any other secondary evidence than that to be obtained out of the mouth of the plaintiff's own attorney; and it is quite clear that the attorney, though willing, could not have been permitted to give such evidence.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—If it had been necessary to plead the facts now relied upon by the defendant specially, would it have been any answer to the declaration, if he had stated that another deed between the same parties, and relating to the same premises, had been executed? I do not give my assent to the case of *Roe v. Harvey*. The decision there amounts in fact to this, that, where a witness proves that the premises were assigned by *A.* to *B.*, there is no proof of title in either party. It is quite clear that the attorney could not be required to state the contents of his client's deed.

GURNEY, B.—To decide, that, under circumstances like these, a party should be at liberty to give secondary evidence of the contents of a deed, would, in my opinion, be productive of very injurious consequences. The fact

Exch. of Pleas, of the instrument being in Court makes no difference
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with regard to the necessity of a notice to produce. Here, the statement of Mr. *Harper* did not prove any variance, for there was no evidence to shew the contents of the deed; but, in *Doe v. Harper*, the witness proved that it was an assignment.

Rule discharged.



WOODWARD v. COTTON.

A local act provided that no ditch, &c., should be arched over, &c., without the consent of the trustees under the act, under a penalty of 50*l.*: —*Held*, that a surveyor, who, after a sewer had been commenced, directed it to be continued (without the consent of the trustees), had incurred the penalty.

A local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such without being specifically pleaded, need not be proved either to have been examined with the Parliament roll, or to have been printed by the king's printer.

DEBT upon the statute 5 *Geo. 4*, c. 125, s. 7.—The first count of the declaration stated, that the defendant, on &c., at &c., did narrow a certain ditch, situate and being in &c., and not under or within the limits of the jurisdiction of any commissioners of sewers, without the consent or approbation of the trustees mentioned in a certain act of Parliament, made in the 5th year of the reign of his late majesty king *George* the 4th,—intituled “ An act to repeal several acts for the relief and employment of the poor of the parish of *St. Mary, Islington*, in the county of *Middlesex*; for lighting and watching, and preventing nuisances and annoyances therein; for amending the road from *Highgate* through *Maiden Lane*, and several other roads in the said parish; and for providing a chapel of ease, and an additional burial ground for the same, and to make more effectual provisions in lieu thereof;”—in writing first had and obtained, according to the form of the statute in such case made and provided, whereby, and by force of the statute, the said defendant for his said offence forfeited the sum of 50*l.*, and thereby, and by force of the said statute, an action hath accrued, &c.

The declaration contained twenty-six other counts, varying the description of the ditch or watercourse, and of the mode in which the offence had been committed. In one set of counts it was alleged to have been committed “ contrary

to the terms and stipulations, and in other manner than had been expressed in a certain consent or approbation in writing had and obtained by the defendant from the trustees mentioned in the said act of Parliament, in this, to wit, that the said consent and approbation, so given and granted by the said trustees, expressed that the said last-mentioned ditch, to be arched over by the said defendant as aforesaid, was not to be less than thirteen feet superficial." The defendant pleaded *nil debet*.

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At the *Middlesex* Sitting after *Michaelmas* Term, 1833, the case was tried before Lord *Lyndhurst*, C. B.; and the facts proved, so far as material to the questions afterwards raised, were as follows:—The defendant was a surveyor, who was employed in that capacity by certain persons who had erected several dwelling-houses within the limits of the local act referred to in the pleadings. After the buildings had been erected, it became necessary to make a sewer, and, there being an open ditch in front of the ground, the defendant applied to the trustees under the local act for permission to make such sewer along the line of the ditch. To this application an answer was received from the clerk to the trustees, granting permission to make such sewer, but requiring that it should be of thirteen feet capacity. The builders of the houses being dissatisfied with this restriction, the sewer was built of smaller dimensions than thirteen feet. It appeared, that, when the sewer was partly proceeded with, the defendant came to the premises, and gave directions with regard to the work, saying, " You must build it according to that which is done." On the production of the local act, no evidence was given of the copy having been compared with the Parliament roll, or of its having been printed by the king's printer; but it contained the usual clause that it should be deemed and taken to be a public act, and should be taken notice of as such by all judges, &c. without being specially pleaded. The clause in it, imposing the penalty for which

Eccles. of Pleas, the defendant was sued, was as follows:—"That it shall
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 and may be lawful for the said trustees from time to time,
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 as they shall see occasion, to widen, deepen, embank,
 alter, arch over, cleanse and scour all and every and any
 of the watercourses, &c." And the section concluded with
 this proviso, "Provided always, that no ditch, drain, or
 other watercourse shall be narrowed, filled up, altered,
 covered in, or arched over, by any person or persons what-
 ever, without the consent and approbation of the trustees
 in writing first had and obtained, nor in any other man-
 ner than is or shall be expressed in such consent; and
 in case any person shall so narrow, fill up, alter, cover in,
 or arch over any such drain or watercourse whatever,
 within such part of the said parish, contrary to the inten-
 tion hereof, he, she, or they shall for every such offence
 forfeit and pay the sum of 50l." It was contended, for the
 defendant, *first*, that the act of Parliament, being a pri-
 vate act, had not been properly proved; and, *secondly*,
 that the defendant was not a person within the meaning
 of the 97th section, who had narrowed, &c. The jury
 found a verdict for the plaintiff on the 20th count (for
 arching over a certain drain contrary to the consent of
 the trustees). They also found that the defendant had
 acted as surveyor. Leave having been given by the Chief
 Baron to move to enter a nonsuit, a rule was obtained by
Steer for that purpose, upon the ground of the objections
 taken at the trial.

Holt now shewed cause.—The first objection is disposed of by the case of *Beaumont v. Mountain* (a), lately decided by the Court of *Common Pleas*, in which *Brett v. Beales* (b), relied upon for the defendant at the trial, was cited. [The Court relieved him from arguing the second point.]

Steer, contra.—The case of *Brett v. Beales* was un-

(a) 10 Bing. 405.

(b) M. & M. 421.

derstood to confirm the doctrine that the clause usually added at the conclusion of private acts did not dispense with the necessity of shewing that they were printed by the king's printer. [Alderson, B.—I think Lord Tenterden only meant to say, in *Brett v. Beales*, that the clause was one respecting the mode of proving the act; and that for other purposes, as, for instance, the recital of matters in it, it did not give it the effect of a public act.] With regard to the second objection, the defendant was not such a person as is contemplated by the act. That, being a penal statute, must be construed strictly; *Dwarris on Statutes* (a); and the penalty imposed by it must, according to the language of Mr. Justice Bayley, in *Denn d. Manifold v. Diamond* (b), be imposed in clear and unambiguous words. The words of the statute here (which imposes a penalty of 50*l.*) are, "That if any person shall narrow," &c. Now the defendant never did narrow the drain; he never laid a brick, or took any one step. He was not even the servant of those for whom the work was done. The jury found that he was the surveyor only. But it is said that he directed the workmen. The sewer was, in fact, begun before he took any part; and the mere direction to proceed will not render him liable to the penalty. The act does not impose the penalty upon those who direct the work, but upon those who do it. The defendant was neither the person who did it, nor the person for whose benefit it was done. He does not come, therefore, within the operation of the statute.

Lord LYNDHURST, C. B.—The case of *Brett v. Beales* has been much misconceived. It is certainly not well reported; but I think, that, upon the whole scope of it, Lord Tenterden meant to rule the same law that is decided in *Beaumont v. Mountain*. The history of the law, with re-

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gard to the proof of private acts of Parliament, is this: Originally, they were required to be proved by a copy examined with the Parliament roll. To avoid this inconvenience, a clause was usually inserted, declaring that a copy printed by the king's printer should be evidence. It was then objected, that, in such cases, it was necessary to prove that the act produced was in fact printed by the king's printer; and, to meet this objection, the present form of clause was adopted.

With regard to the other point, it is clear that the defendant is liable. He is charged with arching over a certain drain contrary to the consent of the trustees. He was the person, emphatically, who caused this to be done by the directions which he gave. It is not necessary that he should have done any part of the work himself in order to render him liable. Where one man directs another to commit a misdemeanor, and the other does so accordingly, the two are equally guilty.

The rest of the Court concurred.

Rule discharged.



LEWIS v. ROGERS, Executor of ELIZABETH ROGERS,
deceased.

A trader, being in embarrassed circumstances, executed an assignment of all her "effects, stock, books, and book debts," for the benefit of her creditors. In an action after her death against the assignee, treating him as executor *de son tort*, it was held that a list of creditors made out about the time of the execution of the assignment, by the direction of the assignor, was evidence as part of the transaction, for the purpose of disproving fraud.

ASSUMPSIT on a promissory note for 10*l.*, made by *Elisabeth Rogers* in her lifetime in favour of the plaintiff. Pleas—*first*, the general issue; *secondly*, *Ne unques ex-*

An assignment for benefit of creditors, by a trader and farmer, of all her "effects, stock, books, and book debts," conveys the cattle on the farm.

ecutor; and thirdly, Plenè administravit. Upon all these pleas issue was ultimately joined. At the trial at the last Spring Assizes for *Carmarthen*, before *Gurney, B.*, it appeared that the maker of the note, *Mrs. Rogers*, kept a small shop and farm at *Pembrey*, in *Carmarthenshire*. The plaintiff proved the execution of the note by her, and shewed the defendant in possession of the property which had belonged to her in her lifetime. In answer to this *prima facie* case, it was proved, for the defendant, that *Mrs. Rogers*, finding her affairs embarrassed, took the advice of the Rev. *Thomas Evans*, the clergyman of the parish, who looked over her books, and ascertained the state of her accounts. An assignment of all *Mrs. Rogers'* effects was, in consequence, prepared by *Mr. Evans*, to the defendant, *Thomas Rogers*, her brother-in-law, for the benefit of her creditors, and signed by her. It was in the following form:—

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“ Having received a letter from Mr. *George Thomas*, on behalf of Messrs. *Melford & Co.*, of *Bristol*, threatening to commence legal proceedings for the recovery of the sum of *35l. 3s. 10d.*, which I could not liquidate by the time specified, in consequence of ill health; under these circumstances, with a view to do justice to my creditors, I have been advised to suspend business, and I do hereby suspend business accordingly, and, as you are my chief creditor, to the amount of *50l. 16s. 7½d.*, I do, by this writing, surrender, deliver up, and assign the whole and every of my *effects, stock, books, and book debts* to you, as trustee for and on behalf of my other creditors.

Pembrey,

17 Feb., 1831.

Your's truly,

E. Rogers.

To Mr. *Thos. Rogers*, Grocer, &c.
Village *Pembrey*.”

The shop was closed immediately on the execution of

Exch. of Pleas, this instrument; but Mrs. *Rogers* continued to occupy the house, and use the furniture till the time of her death, when the whole was taken possession of by the defendant.

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Rogers.*

In order to prove the *bona fides* of the assignment, the defendant tendered in evidence a list of creditors which had been made out by the Rev. Mr. *Evans*, immediately upon the execution of that instrument, from the dictation of Mrs. *Rogers*, for the purpose of having circular letters addressed to the creditors, informing them of that event. Some of these letters were written by Mr. *Evans* himself, who stated he knew some of the creditors. In this list, the name of the plaintiff was omitted. The reception of this evidence was objected to by the counsel for the plaintiff, on the ground that it was merely hearsay, derived from the mouth of Mrs. *Rogers* herself, and that it might have been contrived for the purpose of giving a colour to the transaction; it was, however, admitted by the learned Baron. With the same view, the defendant's counsel also attempted to put in evidence a letter from a Mr. *Thomas*, (the person mentioned in the assignment), pressing Mrs. *Rogers* for money; but after a few words of the letter had been read, and had been taken down in the Judge's notes, upon an objection made and yielded to, this evidence was stopped. It appeared, that, amongst her other property, Mrs. *Rogers* possessed some small farming stock, *viz.* three cows and a mare; and a question was made, whether these passed under the general words of the assignment. The learned Baron left the case to the jury, principally upon the credit due to the testimony of Mr. *Evans*, stating, that, if they believed him, they should find for the defendant. The jury returned a verdict for the defendant on the first and second issues, and were discharged from giving a verdict upon the last. In *Easter Term*, *J. Evans* obtained a rule for a new trial, upon the grounds of the objection taken at the trial.

Chilton, Whitcombe, and James, now shewed cause.—This rule appears to have been moved on a mistaken apprehension of the case of *Edwards v. Harben* (a). [Alderson, B.—There, the possession of the goods was suffered to remain in the debtor.] Here, on the contrary, the whole face of the debtor's affairs was changed, and, in a village like *Pembrey*, the fact of the assignment could not fail to be notorious. An assignment to creditors was proved, as well as the existence of creditors, and the question of fraud was left to the jury, who found rightly for the defendant. [Here, the Court called upon the other side.]

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Evans and Powell, contrd.—It is not necessary to contend that the point left to the jury was improper, but improper evidence was admitted. It is impossible to say how far the jury were influenced in finding the assignment valid, by the evidence of the list of creditors, which ought not to have been received. [Lord Lyndhurst, C. B.—You are precluded from going into the question of the verdict being against evidence, and that the jury ought to have found fraud. The verdict is under 10*l.* You must confine yourself to the point of the admissibility of evidence.] There was no proof of any debts owing by Mrs. Rogers, except that which the plaintiff himself proved, and the list of creditors was not legal evidence. It was merely a statement made by Mr. Evans of what he had heard from Mrs. Rogers' own mouth; and the defendant, claiming under her, cannot make such declarations evidence. The name of the plaintiff did not appear in the list, and there was no evidence to shew that he knew of the assignment. [Lord Lyndhurst, C. B.—That would have been a circumstance to shew fraud; but the question of fraud has been disposed of by the jury.] The list had no resemblance to

(a) 2 T. R. 587; see 1 Bro. & Bing. 512; 4 Moore, 291; 1 Taunt. 382.

Exch. of Pleas, a schedule; it formed no part of the assignment, and had, in fact, no reference to it whatever. It was simply a statement by Mrs. *Rogers*, made upon a separate and independent paper, and was totally inadmissible for the purpose for which it was offered in evidence, *viz.* to shew that there were creditors, and so to establish the validity of the assignment. *Secondly*, evidence was submitted, sufficient to influence the jury, of *Thomas's* letter; a portion of which appears on the learned Baron's notes. [*Gurney*, B.—The evidence was stopped immediately upon the objection being made, and though the words of the witness were taken down as he pronounced them, yet the evidence was not submitted to the jury. *Alderson*, B.—If the evidence was objected to by you, and not admitted, how can you argue against its admissibility? The letter is referred to in the assignment, and the assignment was read in evidence, but the letter itself was never in evidence.] With regard to the last objection, the cows and the mare did not pass under the general words of the assignment. That instrument was intended to transfer the effects of Mrs. *Rogers*, who was a small shopkeeper, and the words used are appropriate to that purpose. They have all reference to her trade; "stock" does not mean cattle, but stock in trade, and this, and the other words, "books" and "book debts," shew the meaning in which the more general word "effects" is to be taken. "Effects" must mean *effects ejusdem generis* with those after mentioned. [*Lord Lyndhurst*.—The cases decided upon that rule are where particular words are used, followed by general words, in which case the latter are held to extend only to matters *eiusdem generis*.]

Lord LYNDHURST, C. B.—The objections with regard to the admission of Mr. *Thomas's* letter in evidence are answered by the fact that the proof was stopped, and not suffered to go to the jury. The list of the creditors was rightly ad-

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mitted, not for the purpose of proving that the persons named in that list were in fact creditors of Mrs. *Rogers*, but as evidence that Mrs. *Rogers*, about the time of executing the assignment, represented the persons mentioned as her creditors. The point in question was the *bona fides* of that transaction, and the declaration of Mrs. *Rogers* was part of the transaction, and therefore admissible (a). The words of the assignment are sufficiently large to comprehend the cattle; and the instrument upon the face of it shews that the object of the assignor was to part with *all* her property for the benefit of her creditors. She states that she suspends her business; and part of her business was the cultivation of the small farm upon which the cattle were kept. It was her obvious intention, therefore, that they should pass under the assignment.

BOLLAND, B.—There is no question as to the letter. The list of creditors was admissible upon the point of *bona fides*. Mr. *Evans*, the clergyman, acted on the occasion in the capacity of assistant or clerk to Mrs. *Rogers*, who had called him in as a friend. Then, by her directions, he prepares this list; and, by his advice, she sends for her brother-in-law, who was her principal creditor, and begs him to act as trustee for the benefit of the other creditors. All these circumstances are admissible to shew the

(a) Where a question arises upon the *intent* with which a certain act was done, the words of the party accompanying the transaction are evidence. Thus, in the bankrupt law, the declarations of the trader, made at the time of his committing the act of bankruptcy, are evidence. Where the question was, whether a composition deed had been executed absolutely or conditional,

evidence was admitted of a conversation which took place immediately before the execution. *Per Cur.*—“The conversation which took place immediately previous to the execution of the deed must be taken as *part of the whole transaction*; and, if so, the subsequent delivery of the deed was conditional.” *Johnson v. Baker*, 4 B. & A. 442.

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Exch. of Pleas, fairness of the transaction. I think, also, that the cattle
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passed under the general words of the assignment.

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ALDERSON, B.—I am of the same opinion. The plaintiff made out a *prima facie* case, by shewing that, on the death of Mrs. Rogers, the defendant intermeddled with the goods, and he sought to charge the defendant as *executor de son tort*. The defendant, in order to justify his intermeddling with the goods, and to shew a title to them, proves an assignment to him of the goods by Mrs. Rogers, in her lifetime, in trust for the benefit of her creditors. Then, in order to establish the validity of this transaction, he proposes to give in evidence a letter from a Mr. Thomas to Mrs. Rogers, pressing her for the payment of a debt; but this, being objected to, was withdrawn from the consideration of the jury. In the assignment the letter from Mr. Thomas is referred to; and in that manner the nature of its contents came properly before the jury, as a representation only, by Mrs. Rogers, that she had received such a letter. The person who prepared the assignment having taken a list of the names of Mrs. Rogers' creditors by her directions, the question is, whether that list was evidence, and for what purpose? I think it was evidence, as part of the transaction, and for the purpose of shewing the circumstances under which the assignment was made; all which were for the consideration of the jury. With regard to the other point, the assignment, if made *bond fide*, extends to all the property. "Effects" is a very comprehensive word. The general intent of the instrument, also, shews that the whole of the property was intended to pass.

GURNEY, B., concurred.

Rule discharged.

GREENSLADE v. TAPSCOTT.

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1834.

THIS was an action of *assumpsit*, in which the plaintiff declared specially on the following agreement:—"Agreement entered into this 4th day of *July*, 1828, between *Amos Greenslade*, of the city of *Bristol*, and *John Tapscott*, of *Minehead*, in the county of *Somerset*. *A. G.* agrees to let, and *J. T.* agrees to take, the estate at *Perriton*, now in the occupation of *J. and T. Rew*, for the term of seven years from the 29th of *September* next, at the annual rent of *85l.*, clear of all taxes, rates, tithes, high rent, and land tax whatsoever, the lease to be drawn by *Mr. Tapworth's* attorney in the precise terms of the lease now existing between the said Messrs. *Rew* and the said *Amos Greenslade*, except that the said *John Tapscott* is to find reed for thatching, by the said *Amos Greenslade's* paying for laying up; and also, except that the lease is to become void on the said *John Tapscott* dying previous to its expiration.

" *Amos Greenslade.*"

The part of the lease to the Messrs. *Rew*, material to the question now raised, was the *reddendum*, "yielding and paying yearly, during the said term, the yearly rent of *80l.*, &c., and also the further yearly rent of *10l.* for every acre, and so in proportion for any less quantity of any part of the meadow or ancient pasture ground which the said *J. R.* and *T. R.* shall plough," &c., "or which he or they shall let, assign, or demise, or suffer to be occupied by any other person without the consent in writing of the said *J. G.* first obtained, such additional rent to be payable from thenceforth quarterly, at the times of payment of the rent aforesaid, during the then remainder of the said term." There was also (amongst others) a covenant "that they the said *J. R.* and *T. R.* should not, nor would, do or commit, or suffer to be done or committed, any wilful or

A lease contained a stipulation, that, for every acre, and so in proportion for a less quantity of the land which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, occupy, dress, and manure the land according to the custom of the country.

The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course: —Held, that the landlord was entitled to the additional rent, this being an occupation of the land by other persons.

Exch. of Pleas, voluntary waste, spoil, or destruction on the said premises,
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or any part thereof, during the said term, but should, on the contrary, use, *occupy*, dress, and manure the same in the manner aforesaid, *and according to the custom of the country*, and the rules of good husbandry."

The first breach assigned in the declaration was as follows:—That the defendant, on &c., did let and demise to certain persons, and did suffer to be occupied by such persons, from &c., up to and until &c., divers, to wit, three acres of land, parcel of the said premises, in certain parts and proportions by such persons respectively, that is to say, the said defendant did let to and suffer to be occupied by one *W. G.* a certain part, to wit, twenty-two yards of the said premises, &c. &c., without the consent in writing of the said plaintiff first obtained, and that thereby an additional yearly rent of &c. became due and payable to the said plaintiff by &c. The defendant pleaded the general issue.

At the trial before *Williams*, B., at the last *Spring Assizes* for the county of *Somerset*, it was proved that the defendant had permitted several persons to take small portions of the demised premises, for the purpose of raising crops of potatoes. The land was used for this purpose about six months, and was delivered up again in the month of *October*. After the potatoes were taken out wheat was sown. Evidence was given that it was the custom of the country for farmers to let out their land in this manner, for the purpose of raising a crop of potatoes. The learned Baron stated it as his opinion, that the suffering the persons to use the land in the manner described was a breach of the agreement; and a verdict was accordingly found for the plaintiff, with 15*l.* damages, being the amount of half-a-year's increased rent for three acres of land. A rule having been obtained in *Easter Term* for a new trial—

Follett now shewed cause.—The only question is, whether the persons who were permitted by the defendant to use different portions of the land for the purpose of raising potatoes were not *occupiers* of the land within the meaning of that term, as used in the lease. In case of an entry upon the land by a stranger, they and they only could have maintained trespass. The lease contemplates a division of the land in these small portions as prejudicial to the landlord, for it imposes an additional rent for every acre so occupied, and so in proportion for any *less quantity*. It is unnecessary to trouble the Court with further arguments, the statement of the facts is sufficient.

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Coleridge, Serjt., and *Ball*, contrâ.—The proper test for deciding this question is not, whether the persons who raised the crops of potatoes were occupiers, but whether they were such occupiers as are contemplated by the lease (*a*). The words are, “ or which he or they shall let, assign, or demise, or suffer to be occupied by any other person, without the consent in writing,” &c. Now, the use made of the land for raising potatoes was not such an occupation as was intended by these words. In *Doe d. Pitt v. Laming* (*b*), the tenant covenanted “ not to grant any under-lease or leases for any term or terms whatsoever, or let, assign, transfer, or set over, or otherwise part with the said messuage, &c., or his or their terms or interest by the said indenture granted or intended so to be, or any part thereof, without the special licence,” &c. It appeared that a clerk in the Post-office had lodged above a twelvemonth in a room in the coffee-house, (the demised premises), *of which he had exclusive possession*. Lord *Ellenborough* said, that the covenant could only extend to such an under-letting as a licence might be ex-

(*a*) As to the principle of construction to be applied to these covenants, see *Crusoe v. Bugby*, 3 Wils. 234; Sir W. Blac. 706;

4 Dowl. & Ryl. 229; *Church v. Brown*, 15 Ves. 265.

(*b*) 4 Camp. 77.

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pected to be applied for, and who ever heard of a licence for a landlord to take in a lodger. That was at least as strong a case as the present in favour of a breach, for it was found that the lodger was in exclusive possession (*a*). If so, he might have maintained trespass, which in this case has been made the test of *occupation*. In *Doe d. Pitt v. Hogg* (*b*), where the covenant was "not to let, set, assign, transfer, or set over, or otherwise part with, the premises demised, or the lease," the Court held, that the depositing of the lease as a security was not a breach of the covenant. *Abbott*, C. J., said, "I am clearly of opinion, that the effect of the covenant is only to restrain the lessee from completely alienating the legal interest in the premises, to the prejudice of the landlord, without his consent in writing (*c*). Here, the meaning of the words is, that the tenant shall not part with the entire occupation of the premises, and not that he shall not allow them to be used in the mode in question, which is, in fact, beneficial to the land, as preparing it for a subsequent wheat-crop. The clause as to "occupation" must be construed with reference to other parts of the lease; and from one of the covenants it appears, that the defendant was to *occupy the lands according to the custom of the country*. Now, it was proved at the trial, that the custom of the country was, for

(*a*) But see *Roe*, lessee of *Dingley, v. Sales*, 1 M. & S. 298, where parting with the *exclusive possession* of part of the premises was held to be a breach of a similar covenant. The same construction has been applied to the stat. 1 Will. 4, c. 18, which requires that the house shall be "actually occupied" under the yearly hiring. *Taunton*, J., says, "We cannot say that the pauper actually occupied a separate and distinct dwelling-house under the yearly hiring, when there was an exclu-

sive occupation of part by another person." *Rex v. St. Nicholas, Rochester*, 5 B. & Adol. 229.

(*b*) 4 Dowl. & Ryl. 226.

(*c*) *Bayley*, J., cites the following passage from *Crusoe v. Bugby*, (3 Wils. 234, Sir W. Blac. 766), which clearly distinguishes *Doe v. Hogg* from the principal case. "The lessor, if he pleased, might certainly have provided against any change of occupancy, as well as against assignment; but he has not done so by words which admit of no other meaning."

farmers to permit a portion of their land to be appropriated in the same way as was done by the defendant, in small lots to different persons, for raising a potato crop, and, therefore, the defendant has only acted in pursuance of the authority expressly given him by the lease.

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PARKER, B.—This was an action of *assumpsit*, brought upon an agreement, referring to the terms of a former lease, in which the tenant engaged, that, in case he should let, assign, or demise, or suffer to be occupied by any other person, without the consent in writing of the landlord, any part of the meadow or ancient pasture ground demised, he should pay an additional rent; and the question is, whether, under the circumstances, there has been “a suffering to be occupied?” The act done by the tenant may possibly not fall within any of the words, “letting,” “assigning,” or “demising;” but I think it impossible not to consider the permitting these parties to come in and use the land in the manner described, as suffering them to occupy. Such an occupation as this, for twelve months, would have conferred a settlement, and the party in occupation would be the only person entitled to maintain trespass for an injury done to the possession. The case of *Doe v. Hogg* is distinguishable; but it is more difficult to say, that *Doe v. Laming* is not applicable. There, however, the demise was of a coffee-house, and, unless there was a distinct agreement with the lodger for the occupation of the particular room, it may be said he had not such an exclusive possession of it as would have entitled him to maintain trespass. If there had been any such distinct demise, then it would have resembled the case of a ready-furnished lodging, and the act might have come within the terms of the covenant. In this view, the case of *Doe v. Laming* may be supported; but I cannot say that the grounds upon which Lord *Ellenborough* decided that case appear to be satisfactory to my mind.

BOLLAND, B.—I am of opinion, that a breach of the

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agreement, not to suffer other persons to occupy the land, was proved. With regard to the argument derived from the custom of the country, it may have been in consequence of that very custom, and to prevent its operation, that the clause as to occupation was introduced. I think it the safest course to adhere to the ordinary meaning of the word "occupy," which includes such a use of the land as that in question (a).

ALDERSON, B.—I am of the same opinion. It seems to me that the words, "according to the custom of the country," refer to the mode of cultivation, and not to the practice of suffering the lands to be occupied in the manner in question. The fact of the existence of such a custom may have been the very ground upon which the proviso, with regard to the occupation of the premises by other persons, was inserted. That clause could have been framed in no other way by a person desirous of excluding the operation of the custom. The settlement cases are almost identical with the present; and it may have been expressly with a view to those cases, that the parties have inserted the clause in question. There is no doubt that the land was occupied, and that it was occupied without the landlord's licence. I give no opinion upon the authority of *Doe v. Laming*, which may, perhaps, be supported upon the peculiar facts of the case.

GURNEY, B.—It seems to me, that the clause was framed for the very purpose of providing for the case which has occurred.

Rule discharged.

(a) "The meaning of the word 'occupied' may vary according to the occasion, or the subject-matter. The meaning, therefore, which it has received in considering what occupation is necessary to constitute a mansion-house, in which burglary may be commit-

ted, or to give a right of voting, or to make a party liable to the relief of the poor, is no test of its meaning in this particular case. (A question on the stat. 1 Will. 4, c. 18)—*Per Denman, C. J. Rex v. St. Nicholas, Rochester*, 5 B. & Adol. 226.

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NEALE v. M'KENZIE.

DECLARATION in trespass for breaking and entering the dwelling-house, and seizing and detaining the goods of the plaintiff.

Cleasby obtained a rule to plead several matters, *viz.* *not guilty*, and a justification for entering the house as landlord, to seize the goods on a distress for rent in arrear, (*Gurney*, B., having refused to allow it to be had at chambers).

Comyn shewed cause, and contended that the Court ought not to permit the two pleas. By the stat. 11 *Geo. 2*, c. 19, s. 21, the defendant could give all the special matter in evidence under the general issue, and by the new rules *H. T. 4 Will. 4*—“Pleas founded on one and the same subject-matter, varied in statement, description, or circumstances only, are not to be allowed.”

Cleasby, contrà, contended that the new rules made no difference. The defendant is entitled to deny trespasses, and justify them. He denies them by the general issue, and justifies them by the plea. By the stat. 11 *Geo. 2*, c. 19, it is lawful for him to give the special matter in evidence under the general issue; but he is not compelled to do so. It is an advantage to him to plead specially, because it narrows his proof; and the commencement of the fifth rule, *H. T. 4 Will. 4*, shews that the object of the new rules was to bring to the knowledge of the parties the facts intended to be disputed. If he is confined to the general issue, he will be compelled to go to trial prepared to prove every thing.

Lord LYNDHURST, C. B.—You must make your election. If you plead the plea of the general issue given to you by the statute, you must take it with all its incon-

Where a defendant may by statute give matter of justification in evidence under the general issue, he will not be permitted to plead the general issue and also a special plea of justification.

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veniences. We have been obliged by the statute to except from the operation of the new rules cases in which the right of pleading the general issue is given to parties by statute. It has been said, that the defendant was entitled to these two pleas before the new rules, and that the new rules make no difference; but he was not so entitled without the leave of the Court, which has always had the power of limiting the party to the general issue if they think fit. You must make your election, but you may have twenty-four hours to do it in.

Rule discharged, without costs.

LORYMER v. STEPHENS.

There being mutual accounts between *A.* and *B.*, the latter met *C.*, *A.*'s brother, to settle them. Two accounts were brought by *C.* The first contained various items of money received by *B.* for *A.* *B.* settled and signed this account. *C.* then produced another account between the parties respecting other items, which *B.* disputed, and refused to settle. No evidence was given of money had and received but the above:—*Held*, that *A.* was entitled to recover upon the count for money had and received.

ASUMPSIT for money paid, money lent, money had and received, and on an account stated. Plea—the general issue, with notice of set-off. At the trial before Mr. Baron *Williams*, at the *Somerset Lent Assizes*, it appeared that the plaintiff had been engaged by the defendant as captain of a vessel belonging to the defendant. He remained for one year in the defendant's service; at the expiration of which time, he returned to *Bristol*. Upon his return, a meeting took place between him and the plaintiff's brother, who produced a debtor and creditor account, in which the defendant was debited with a sum of *730l. 11s. 10d.* for money received by him for the defendant, and had credit for various sums from plaintiff in disbursements, &c. The balance upon the face of this account in favour of the plaintiff was *370l. 0s. 6d.* This account was signed by the defendant. At the same interview, the plaintiff's brother produced another account relating to the defendant's claim upon the plaintiff for wages; but the defendant would not assent to it, saying that he must look into it, and that he would return next morning at eleven o'clock, which he omitted to do. Both these accounts being produced, the learned Baron was of opin-

ion that there was no evidence of a settled account, and the plaintiff was accordingly nonsuited. In *Easter Term* last, *Erle* having obtained a rule for a new trial—

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Follett now shewed cause.—Both the papers in question, which constitute only one account, were prepared by the plaintiff. On the defendant's return, he meets the plaintiff's brother, and, first, one of the papers, (which does not contain all the transactions between the parties), and then the other, (which contains the remainder of the transactions), are produced. To the correctness of the first, the defendant assents, and signs it; and, on the face of that contract, there is a balance against him of 370*l.* 0*s.* 6*d.* But, when the other paper containing the account of wages is produced, he demurs to it, and refuses his assent. Now, the state of accounts in the first paper must be affected by that in the second, and, in refusing his assent to the latter, the defendant refused also to recognise the former. The whole was one transaction, and the two papers cannot be considered apart. It is precisely the same thing as if the plaintiff had opened his ledger, and exhibited part of the account in one page, to which the defendant assents, and part in another, which he disputes. Could it be contended, that the amount appearing at the bottom of the first page might be recovered under the account stated? [*Parke, B.*—Supposing that the plaintiff cannot recover on the account stated, there is a count for money had and received; and the defendant, on the first account, has admitted a much larger sum due as money had and received than the balance claimed by the plaintiff.] The question would still remain the same—Whether this, being all one transaction, and the defendant having disputed the correctness of part of the account, can be taken to have assented to any portion of it? There was no other proof of money had and received, but the admission of the defendant, and that admission was not sufficient.

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Erle, contrð, was stopped by the Court.

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PARKE, B.—There was a distinct admission, in the first account, of upwards of 700*l.* being due to the plaintiff for money had and received by the defendant to his use. This admission stands altogether independent of the account stated, and the plaintiff was entitled to recover upon the count for money had and received.

ALDERSON, B.—A particular account is struck between the parties, charging and discharging, and is signed by the defendant. This account contains various items for money had and received by the defendant for the plaintiff. Surely, that is sufficient.

Rule absolute.

—————
HAMMOND v. THORPE.

Where an action is brought by an attorney without the plaintiff's consent, and the defendant at the trial agrees to withdraw a juror, the Court will not order the attorney acting for the plaintiff to pay the costs of the defendant.

THESIGER had obtained a rule calling upon the plaintiff's attorney to shew cause why he should not pay to the defendant the costs incurred by him in defending this action. The affidavits stated, that the plaintiff's attorney had procured the plaintiff, who was an illiterate person, to sign a paper giving him authority to bring the action, without acquainting him with the object and intent of the writing, and that the plaintiff had never, in fact, authorized the bringing of the action; that at the trial of the action, which was a trespass *quare clausum fregit*, to which the defendant pleaded leave and licence, upon the suggestion of the learned Judge before whom it was tried, a juror was withdrawn.

Erle now shewed cause, upon affidavits contradicting in many material respects those upon which the rule had been obtained.

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ALDERSON, B. (*a*).—Independently of the disputed facts, the question is, whether, after the defendant by consenting that a juror should be withdrawn had agreed to pay his own costs, can now come forwards and claim them from the plaintiff's attorney? There is no instance of such an application ever having been granted. If the trial had proceeded, and the defendant had obtained a verdict, and the plaintiff had been insolvent and unable to pay the defendant's costs, the latter might, upon the grounds stated, have applied to the Court to place the attorney in the situation of the plaintiff, and make him liable to the costs to which the defendant had been put; but here the defendant has chosen by his agreement to take his own costs upon himself, and he cannot afterwards charge another person with the burthen. [The Court likewise expressed an opinion that the affidavits in support of the rule had been answered.]

The rest of the Court concurring, the rule was discharged with costs.

(*a*) Lord C. B. *Lyndhurst* had left the Court.



PATMORE v. COLBURN.

ASSUMPSIT.—The first two counts of the declaration were framed upon the agreement of the 28th *May*, 1831,

On the 28th *May*, *A.* entered into an agreement with *B.*, for twelve

months, for the performance of various literary labours, to be thereafter indicated by *B.*; *A.* to receive from *B.* for the said literary labours the sum of six guineas per week, and not to engage, during the twelve months, in any publication similar to the one of which *B.* was the proprietor. On the 14th *October* in the same year, a new agreement was entered into by the parties, in which *A.* agreed to edit the *Court Journal*, and to devote all his time and attention to the same, except the hours he had already engaged to devote to the superintending of the *C. P.* (a publication with which *B.* was not connected), at a salary of 10*l.* per week:—*Held*, that the second agreement superseded the first; and that *A.* could not recover the six guineas per week for the remainder of the twelve months after the second agreement came into operation.

Exch. of Pleas, hereafter set out; and the breach assigned in both was the
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 not paying to the plaintiff the sum of six guineas per
 week during the twelve months. The third and fourth
 counts were framed upon the agreement (also set out
 hereafter) of 14th *October*, 1831; and the breach in all
 these counts was, the non-payment of the sum of 10*l.* per
 week, and the discharging the plaintiff from his employ-
 ment under the latter agreement without proper notice.
 Plea—the general issue.

At the trial, at the *Middlesex* Sittings after *Trinity*
 Term, 1833, before *Vaughan*, B., a verdict was found for
 the plaintiff, with liberty for the defendant to move to en-
 ter a nonsuit. It appeared on the evidence, that, if the
 second contract operated to supersede the first, there
 would be nothing due from the defendant to the plaintiff.
 In *Michaelmas* Term last,

Follett obtained a rule to shew cause why the verdict for
 the plaintiff should not be set aside, and a nonsuit entered.

The agreement of the 28th *May*, 1831, was in the
 following words:—

“ Memorandum of an agreement made this day between
 Peter Geo. Patmore, Esq., on the one part, and
 Henry Colburn on the other part.

“ The said Mr. *Patmore* agrees to enter into an agree-
 ment for twelve months with the said Mr. *Colburn* for the
 performance of various literary works to be hereafter in-
 dicated by the said Mr. *Colburn*.

“ The said Mr. *Patmore* to receive from the said Mr.
Colburn for the said literary labours the sum of six guineas
 per week.

“ Should any difference of opinion arise as to Mr. *Pat-*
more's performing his present engagement to the full ex-
 tent, as equivalent to such sum of six guineas per week, the
 matter to be referred to two indifferent literary persons,
 one to be named by each party, whose award is to be final.

"It is further agreed between the said parties, that Mr. *Patmore*, having been connected with the *Court Journal*, shall not, during the above-mentioned period of twelve months, engage in any other similar publication; but that, at the end of six months from the present date, he shall be at liberty to purchase such share of the journal as may hereafter be agreed upon at the present estimated value of 5,000*l.* for the whole property, such share not to be less than one fifth of the whole.

"It is also finally agreed, that Mr. *Patmore* shall abandon all hostile proceedings against Mr. *Colburn*, and that Mr. *Colburn* on his part shall abandon all pecuniary claims on Mr. *Patmore* up to the present period.

"P. G. Patmore,
"Henry Colburn."

The agreement of the 14th *October*, 1831, was as follows:—

"This agreement is made this day between *Henry Colburn*, of *New Burlington Street*, publisher, of the one part, and *Peter George Patmore*, of *Craven Hill*, Gent., of the other part.

"The said *Peter G. Patmore* hereby agrees, on or before the 12th day of *November* next, to take upon himself the various duties of editing the publication called the *Court Journal*, now the entire property of the said *Henry Colburn*; to devote all his time and attention to the same, save and except the hours he has already engaged to devote to the superintendence of the *County Press*, and which hours are not to be increased beyond those at present required on the *Saturday* and *Monday* in each week, so that they shall not interfere with the time and attention necessary to be given to the *Court Journal*. And the said *Peter Geo. Patmore* hereby undertakes the literary management of the said *Court Journal*, and to prepare for the press all articles and matters belonging thereto to the

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*Henry Colburn; to write on the average one original article weekly, also the reviews and articles of fashion, music, literature, the drama, fine arts, digest of political events; to select from other journals all that may be found suitable for the pages of the *Court Journal*, and generally to contribute to the utmost of his power to the interest and success of the said journal.*

“ That the said *Henry Colburn* shall pay to the said *Peter Geo. Patmore*, for such editing, management, and writings, at the rate of 10*l.* per week, in quarterly payments.

“ That, anticipating the successful result and exertions of the said *Peter Geo. Patmore* in favour of the said journal, this agreement is entered into between the parties in full confidence of its becoming a permanent one, although it is for the present agreed upon that it shall be legally binding for one year, and subject at that period, or any more remote one, to be terminated by either party on giving three months' notice to the other.

“ That, with a view to render still more permanent the interest of the said *Peter Geo. Patmore* in the said journal, it is hereby agreed, that, on or before the expiration of the said year, or at any subsequent period whilst he remains editor on account of the said *Henry Colburn*, that the said *Peter Geo. Patmore* shall have the option of purchasing a quarter share of the said journal, at the present estimated price of 1,000*l.*, whatever higher value it may be of at such future period.

“ It is also hereby expressly agreed upon, that political controversy and party politics shall form no part of the said journal, without the consent of the said *Henry Colburn*, and the most perfect impartiality be adopted in the literary and critical departments.

“ It is also hereby agreed, that the free admissions to theatres and other public places of amusement, and all

books, prints, and publications, sent for the purpose of reviewing, shall be equally divided between the said parties for their mutual use and convenience.

"In witness whereof the said parties have hereunto set their hands.

"*P. G. Patmore,*
" *Henry Colburn.*"

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Lee now shewed cause.—The agreement between the plaintiff and the defendant of the 28th *May*, 1831, was, that the latter should employ the former for twelve months certain, at the rate of six guineas per week, and there was nothing to put an end to the contract before the determination of that period. The terms of the agreement shew that it was intended to be a contract for a term certain. The plaintiff, who had been employed in literary undertakings of the same nature, agrees that he will not, "during the above-mentioned period of twelve months, engage in any other similar publication." The remuneration on the part of the defendant, therefore, was intended to be co-extensive with the engagement of the plaintiff not to enter into any similar undertaking. If construed otherwise, the plaintiff might have been compelled to relinquish his means of subsistence, while the defendant, on the other hand, might, by forbearing to employ him, have discharged himself from his liability to pay the six guineas per week. It was not pretended that the plaintiff had not performed all that had been required of him by the defendant, or that he had not been ready and willing to perform his duties under this agreement for the whole term of twelve months; and, if he was ready and willing, he was entitled to recover for the whole term, although the defendant did not choose to find him employment. *Gandall v. Pontigny* (*a*). [Alderson, B.—By the agreement of the 14th *October*,

(a) 4 Camp. 375. *Vide ante*, p. 26.

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1831, the terms of the contract were changed. Can both the contracts be enforced at the same time?] The two agreements are not inconsistent with each other. By the second contract the plaintiff agrees to take upon himself the various duties of editing the *Court Journal*, and to devote all his time and attention to the same, except the hours he has already engaged to devote to the superintendence of the *County Press*. There is, indeed, no exception of the time which he was to devote to the performance of his duties under the first agreement, but the reason of that omission is, that the case was already provided for by the express agreement of the parties, and did not require to be excepted. [Alderson, B.—If he was to devote all his time, with the exception of that bestowed upon the *County Press*, to the *Court Journal*, what time has he to give to the performance of the former contract?] All his time means all that is necessary to the proper conduct of the journal; and if, by extraordinary diligence, he accomplishes all that is so necessary, by bestowing less than his whole time upon it, the remainder is at his own disposal. [Lord Lyndhurst, C. B.—There may be degrees in the mode of conducting a publication. It may be done *well*, or *better*, or *extremely well*, and the defendant may have intended to exclude every question of this kind by stipulating that the editor should devote the *whole* of his time to the publication. It may have been very important that his whole time should be employed upon it, in polishing his style, obtaining more information, &c. It might also be of great consequence that he should never be tempted to neglect the *Court Journal*, to employ himself upon other publications.] How is a man's whole time to be computed? Is it eight, or ten, or twelve hours in the four-and-twenty? [Lord Lyndhurst, C. B.—If I were to engage as a tutor, to devote the whole of my time to the education of one pupil, could I, consistently with that engagement, take a second pupil?] There is nothing in the

second agreement to shew that it was intended to supersede the first, nor could any such intention be gathered from the conduct of the parties. On the contrary, it was in evidence, that, after the second agreement, the plaintiff was called upon by the defendant to perform services which did not come within the terms of that agreement. [Lord *Lyndhurst*, C. B.—There was nothing to refer those services to the first agreement. With regard to them the plaintiff might be entitled to a remuneration on a *quantum meruit*.] To this extent, at all events, the plaintiff is entitled to retain his verdict (a).

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Follett and Cowling, contra, were stopped by the Court.

Lord *LYNDHURST*, C. B.—The only question in this case is, whether the first agreement of *May*, 1831, was subsisting after the parties had entered into the second agreement of *October* in the same year; and I am of opinion that it was not a subsisting agreement after that time. The provisions of the two contracts are inconsistent in many respects, and the second could not be operative if the first were still in existence.

BOLLAND, B.—I am of the same opinion. There are various inconsistent stipulations in the two agreements. By the agreement of *May*, the plaintiff was to be at liberty to purchase such share of the journal as might thereafter be agreed upon, at the estimated value of *five* thousand pounds for the whole property. By the agreement of *October*, he was to have the option of purchasing a quarter share of the journal at the estimated price of *one* thousand pounds, whatever higher value it might be of at that period. Then, in the former agreement, there

(a) It appeared, that, by the particulars of demand, the plaintiff's claim was confined to the two agreements, and this ground was therefore abandoned.

Exch. of Pleas, was no stipulation as to the whole of his time, and no exception with regard to the superintendence of the *County Press.* These circumstances shew that the first contract could not be intended to have any existence after the second came into operation.

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ALDERSON, B.—The second contract is clearly inconsistent with the first. By the first, the plaintiff was only bound to devote so much of his time as was necessary for the performance of the various literary works to be indicated by the defendant. By the second agreement, he undertakes to devote all his time and attention (with the exception of that given to the *County Press*) to the duties of editing the *Court Journal.* If he was to devote *the whole* of his time to this object, there could be none left to bestow upon the various literary works mentioned in the first contract. The stipulation was intended to prevent the temptation to which he might have been exposed to neglect the *Court Journal*, had he been allowed to engage in other literary undertakings. When he performed other services for the defendant not under the second agreement, it was with the defendant's assent, who must have agreed on those occasions to waive the stipulation that the whole of the plaintiff's time should be devoted to the *Court Journal.*

Rule absolute.

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CASE.—The declaration stated that the defendant, before and at the time of the committing of the grievances by the defendant, had been and was retained and employed by the plaintiff to take upon himself (a) the various duties of editing a certain publication, to wit, a publication called the *Court Journal or Gazette of the Fashionable World*, then the entire property of the plaintiff, and whereof the plaintiff was then and there the proprietor, and to devote all his time and attention to the same, save and except the hours he had already engaged to devote to the superintendence of the *County Press*, and which hours were not to be increased beyond those then required on the *Saturday* and *Monday* in each week, so that they should not interfere with the time and attention necessary to be given to the *Court Journal*; and to undertake the literary management of the said *Court Journal*, and to prepare for the press all articles and matters belonging thereto to the best of his ability, and to the satisfaction of the plaintiff; to write on the average one original article weekly, also the reviews, and articles of fashion, music, literature, the drama, the fine arts, digest of political events; to select from other journals all that might be found suitable to the pages of the *Court Journal*; and generally to contribute to the utmost of his power to the interest and success of the said journal, for reward to the defendant in that behalf. And it was stipulated that political controversy and party politics should form no part of

injury sustained was not connected with the breach of duty averred, it not appearing that the printing and publishing of which the plaintiff was convicted was the same act as that with which the defendant was charged, viz. the inserting and publishing.

Scumble, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction.

(a) See the agreement set out, *ante*, p. 67.

The declaration stated that the defendant had been employed by the plaintiff to edit the *Court Journal* for reward, and that he did not perform the duties of editing the same in a proper manner, *but, without the knowledge, leave, authority, or consent of the plaintiff, "falsely, maliciously, and negligently inserted and published in the same a false and malicious libel," &c.* That afterwards, an information was exhibited against the plaintiff "for the falsely and maliciously printing and publishing" of the said libel, and such proceedings were thereupon had that the plaintiff was convicted of that offence, and fined 100*l.* After verdict for the plaintiff the judgment was arrested, on the ground that the

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the said journal without the consent of the plaintiff; and that the most perfect impartiality should be adopted in the literary and critical departments; and the defendant had then and there accepted such retainer and employment; and under and by virtue thereof, at the time of the committing of the grievances hereinafter next mentioned, had taken upon himself the various duties aforesaid, and then and there was the editor of the said publication called the *Court Journal*; yet the defendant, disregarding his duty in that behalf, and contriving and wilfully intending to injure and aggrieve the plaintiff, did not perform and discharge the various duties of editing the said publication called the *Court Journal* in a due and proper manner; but on the contrary thereof, to wit, on &c., in &c., *without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently (a) inserted and published, and caused to be inserted and published, in the said publication called the Court Journal, the false, scandalous, malicious, libellous, and defamatory matter following, of and concerning &c. &c.*—[the declaration then set out a gross libel on a peeress]—contrary to his duty as such editor as aforesaid, and to the duties which he had been retained to perform as aforesaid, and in breach and violation thereof. And the plaintiff further says, that an information was afterwards, to wit, in *Easter Term*, in the second year of the reign of our said lord the king, filed in the Court of our said lord the king, before the king himself, by *Edmund Henry Lushington, Esq.*, coroner and attorney of our said lord the king, in the Court of our said lord the king, before the king himself, who prosecuted for our said lord the king in that behalf against the plaintiff and one *Thomas Hargette*, one *Thomas Saville*, and one *Mr. Thomas*, *for the falsely and maliciously printing and pub-*

(a) The declaration had been amended by the insertion of the word "negligently."

listing of the said libel; and that such proceedings were thereupon had in the same Court that it was then and there considered and adjudged by the said Court that the plaintiff should be convicted of the said offence, and that he should pay a fine to our lord the king of 100*l.* for that offence; and that he should be committed to the custody of the marshal of the *Marshalsea* of the said Court of our said lord the king, before the king himself, until he should have paid the said fine; by means and in consequence whereof the plaintiff was then and there forced and obliged to pay and did then and there pay the said fine; and also, by means and in consequence of the premises, the plaintiff was forced and obliged to pay and became liable to pay certain costs and expenses to a large amount, to wit, to the amount of 100*l.* in and about his defence in the said prosecution, and in and about the endeavouring to mitigate the sentence of the said Court upon him for the said offence. [And the plaintiff says, that he was so prosecuted as aforesaid by reason and in consequence of the committing of the said grievances by the defendant as aforesaid]; and that by reason and in consequence of the premises, the plaintiff has been otherwise greatly injured and damaged, to wit, &c. There was a second count similar in substance to the first, but not containing the averment marked with brackets. The defendant pleaded the general issue. At the trial before Lord *Lyndhurst*, C. B., at the Sittings after last *Hilary Term*, the facts of the plaintiff's case were proved as stated in the declaration. It appeared that the plaintiff had pleaded guilty to the information. The jury found a verdict for the plaintiff, with 193*l.* damages. In *Easter Term*, *Maule* obtained a rule to shew cause why the judgment should not be arrested, or why the verdict for the plaintiff should not be set aside, and a new trial had.

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the said journal without the consent of the plaintiff; and that the most perfect impartiality should be adopted in the literary and critical departments; and the defendant had then and there accepted such retainer and employment; and under and by virtue thereof, at the time of the committing of the grievances hereinafter next mentioned, had taken upon himself the various duties aforesaid, and then and there was the editor of the said publication called the *Court Journal*; yet the defendant, disregarding his duty in that behalf, and contriving and wilfully intending to injure and aggrieve the plaintiff, did not perform and discharge the various duties of editing the said publication called the *Court Journal* in a due and proper manner; but on the contrary thereof, to wit, on &c., in &c., *without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently (a) inserted and published, and caused to be inserted and published, in the said publication called the Court Journal, the false, scandalous, malicious, libellous, and defamatory matter following, of and concerning &c. &c.*—[the declaration then set out a gross libel on a peeress]—contrary to his duty as such editor as aforesaid, and to the duties which he had been retained to perform as aforesaid, and in breach and violation thereof. And the plaintiff further says, that an information was afterwards, to wit, in *Easter Term*, in the second year of the reign of our said lord the king, filed in the Court of our said lord the king, before the king himself, by *Edmund Henry Lushington*, Esq., coroner and attorney of our said lord the king, in the Court of our said lord the king, before the king himself, who prosecuted for our said lord the king in that behalf against the plaintiff and one *Thomas Hargette*, one *Thomas Saville*, and one Mr. *Thomas*, *for the falsely and maliciously printing and pub-*

(a) The declaration had been amended by the insertion of the word “negligently.”

listing of the said libel; and that such proceedings were thereupon had in the same Court that it was then and there considered and adjudged by the said Court that the plaintiff should be convicted of the said offence, and that he should pay a fine to our lord the king of 100*l.* for that offence; and that he should be committed to the custody of the marshal of the *Marshalsea* of the said Court of our said lord the king, before the king himself, until he should have paid the said fine; by means and in consequence whereof the plaintiff was then and there forced and obliged to pay and did then and there pay the said fine; and also, by means and in consequence of the premises, the plaintiff was forced and obliged to pay and became liable to pay certain costs and expenses to a large amount, to wit, to the amount of 100*l.* in and about his defence in the said prosecution; and in and about the endeavouring to mitigate the sentence of the said Court upon him for the said offence. [And the plaintiff says, that he was so prosecuted as aforesaid by reason and in consequence of the committing of the said grievances by the defendant as aforesaid]; and that by reason and in consequence of the premises, the plaintiff has been otherwise greatly injured and damaged, to wit, &c. There was a second count similar in substance to the first, but not containing the averment marked with brackets. The defendant pleaded the general issue. At the trial before Lord *Lyndhurst*, C. B., at the Sittings after last *Hilary Term*, the facts of the plaintiff's case were proved as stated in the declaration. It appeared that the plaintiff had pleaded guilty to the information. The jury found a verdict for the plaintiff, with 193*l.* damages. In *Easter Term*, *Maule* obtained a rule to shew cause why the judgment should not be arrested, or why the verdict for the plaintiff should not be set aside, and a new trial had.

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Follett and *Cowling* shewed cause.—The only point to be

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argued is this:—Whether the proprietor of a newspaper, who, in consequence of a libel inserted in the paper by his editor, has been subjected to a criminal information, convicted, and fined, is entitled to recover against the editor the expenses which he has incurred by his misfeasance. The plaintiff is, in fact, a perfectly innocent person. The declaration states, that the defendant, “without the knowledge, leave, authority, or consent of the plaintiff,” caused the libel to be inserted; and it was never contended that the plaintiff was in any degree cognizant of or consenting to that act. He was perfectly ignorant of the whole transaction. Had it been otherwise, had he been in any degree consenting to the publication, he could not, of course, have maintained this action. [Alderson, B.—Is it not more correct to say that the plaintiff was actually ignorant but legally cognizant?] The principle upon which a publisher is held to be criminally responsible for a libel published by his servant, is not grounded upon a presumption of his knowledge and consent to the publication; for if so, this presumption, like all others, would be liable to be rebutted by evidence that he had no knowledge, and that he never consented. But it has been repeatedly held that the fact of the party's entire ignorance is no answer to a criminal proceeding. Persons residing at a distance, who could not possibly have been cognizant of the publication, have, notwithstanding that fact appeared upon the trial, been convicted of publishing libels. The principle upon which this part of the criminal law, which is certainly anomalous, rests, appears to be this, that, upon grounds of public policy, the law will hold the master to be criminally answerable for the acts of his servants, in order that he may exercise the greatest prudence in the selection of those whom he employs. [Alderson, B.—My difficulty is this. If the law presumes the proprietor cognizant of the acts of his servants, and holds him criminally liable, must not that liability be taken with all its usual consequences?] There

cannot be a conclusion of law founded upon that which is contrary to the facts of the case; and therefore the doctrine in question must rest upon another principle, *viz.* that the party is bound to take care that nothing libellous is inserted in his publications, and that the neglect of that duty is for reasons of public policy criminally punishable. The plaintiff, then, being actually innocent, though compelled by the act of his servant to pay the penalty of an offence, seeks to recover the damages which by that act he has sustained. The defendant is charged in the declaration with having "negligently" caused the insertion of the libel. Now, it is a clear principle of law, that where damage is occasioned to one man by the negligent act of another, an action on the case may be maintained (*a*). In the present case, it is clear that the plaintiff has suffered damage by the negligent act of his servant; and there is this peculiarity, that he has also been rendered by that neglect criminally responsible. What distinction is there between the present case and those in which the master has been held liable in a civil action for the negligence of his servant? Suppose, in this case, that the plaintiff, instead of being proceeded against by a criminal information, had been sued for the libel in a civil action, would not his servant be liable? [Lord *Lyndhurst*, C.B.—There is this distinction between the case of libel and that of other acts committed by servants, that, whether the libel be published negligently or wilfully, the master is responsible, but in other cases he is answerable only where the act is negligent. *Alderson*, B.—A master is presumed to authorise the insertion of a libel; in other cases the master is not presumed to authorise the wilful act of his servant in committing a tort. Does not the proprietor of a newspaper give authority to the editor to publish every thing, libellous or not? Does not such a general authority cover

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(*a*) Com. Dig. Action on the Case.

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the publication of a libel?] It is a sufficient hardship upon the proprietors of newspapers, that they should be held responsible criminally for acts of which they were totally ignorant; but it would be adding injustice to hardship if they were prevented from recovering from the party really offending the damages which they have sustained by his negligence. It will be contended on the other side, that the plaintiff and the defendant are joint tort-feazors, and that no action can be maintained in consequence. But this is not the case of a wrong jointly committed by the two. It appears, and is admitted on the face of the record, that the act in question was done without the knowledge and consent of the plaintiff. But it will be said, that, though the fact may be so, the law regards them both as guilty. For the purpose of criminal animadversion it certainly does so, and with regard to the party libelled, but not *inter se*. The common case of a servant made answerable to his master for his negligence proves this. In law, both the master and servant are guilty of the negligence; and in law a party who has been guilty of negligence himself cannot recover for the damage he has suffered in consequence; and yet, in numerous instances, the master has been allowed to recover against his servant under such circumstances. That the fact of the parties being joint tort-feazors as against a third person will not prevent one of them from recovering against the other, appears from the case of *Adamson v. Jarvis* (a). *Best*, C. J., there states—"From the inclination of the Court in this last case (b), and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixon* (c), and from reason, justice, and sound policy, the rule, that wrong-doers cannot have contribu-

(a) 4 Bingh. 66; 12 B. Moore, 241, S. C.

(b) *Phillips v. Biggs*, Hardr. 164.

(c) 4 T. R. 186. Lord *Kenyon* said, that "this decision would not

affect cases of *indemnity*, where one man employed another to do acts not unlawful in themselves for the purpose of asserting a right."

tion or redress against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act;" and he adds the following illustration—" If a man buys the goods of another from a person who had no right to sell them, *he is a wrong-doer to the person whose goods he takes;* yet he may recover compensation against the person who sold the goods to him." In the following case, also, a remedy was afforded to one who was in law a joint tort-feazor. " A sea captain, in the African Company's service, seized a ship trading on the coast of *Guinea*. She was condemned as prize, and her cargo accounted for to the company. Nineteen years afterwards, a freighter brought trover against the executor of the captain, and recovered 2,500*l.* damages. The executor brought a bill against the freighter and the company, but was dismissed as to the freighter, because the executor might have defended himself at law; but the company was decreed to indemnify the executor, and the freighter to prosecute the decree in the executor's name. And though the captain had received 700*l.* for his service from the company, yet the executor was not to refund or abate, that being only a gratuity to him, he acting only as their servant or agent; and the *quantum* of the damage must be the same as was recovered against the executor at law, because they might have defended the trial." *Langdon, Executor of Dickenson, v. The African Company* (a). The same principle was recognised in *Humphreys v. Pratt* (b). There a creditor delivered a *fi. fa.* to a sheriff to be executed against the goods and chattels of his debtor, and pointed out some cattle on the lands of the debtor as being the property of the latter, when, in fact, they were not so. Upon this representation the sheriff took them in execution.

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(a) 15 Vin. Ab. 316.

(b) 2 Dow & Clark, 218.

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The real owner sued the sheriff and recovered; and it was held by the *House of Lords*, that the sheriff was entitled to recover against the creditor the damages and costs incurred by his misrepresentation. Yet there, as against the owner of the cattle, the sheriff and the creditor were joint tort-feasors. Suppose that, in the agreement recited in the declaration, the defendant had expressly promised to make good to the plaintiff all damages which he might sustain by reason of the insertion of any libel by the defendant in the *Court Journal*; could it be said that such an agreement was illegal, and could not be carried into effect? A bond given by a surety to indemnify a master against the embezzlement of his clerk, and a bond given to indemnify the sheriff against the illegal acts of his bailiff, are valid instruments. [Gurney, B.—Is there any instance of an action having been brought for compensation for having been convicted of an offence?] No: but this is an anomalous case; for though, by the policy of the law, the plaintiff is convicted of the offence, yet, in point of fact, the defendant is the real offender, and that fact appears upon the record. The plaintiff in this case does not seek *contribution* but *indemnity*. This distinguishes the case from *Merryweather v. Nixon*, which was an action for contribution, the plaintiff admitting that he was equally guilty of the tort with the defendant; and Lord Kenyon there adverts to the distinction between indemnity and contribution. There is nothing to take this case out of the general principle, that where a party has suffered a loss or damage from the negligent act of another, he is entitled to be indemnified against it; and it makes no difference whether the damage has been occasioned by writ or by criminal proceedings.

Maule, for the defendant.—No such action as the present can be maintained. It is an action brought by a per-

son who has been convicted of a crime to exonerate himself from the consequences of that conviction. It has been assumed on the other side, that, upon the face of this record, it appears that the plaintiff was in point of fact neither cognizant of, nor consenting to the commission of the offence of which he has been convicted. But upon examining the declaration, it will appear, that there is no averment of his not having committed the offence himself. It states, that the defendant, without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently inserted the libel in question in the *Court Journal*, and that an information was afterwards filed against the plaintiff, "for the falsely and maliciously printing and publishing of the said libel," and that such proceedings were thereupon had that the plaintiff was convicted "of the said offence." Now, what is the offence as thus stated? That of "falsely and maliciously printing and publishing the said libel." But what is there to connect this printing and publishing, of which the plaintiff was convicted, with the inserting and publishing the same libel in the *Court Journal*, with which the defendant is charged? The two acts upon the face of this record stand perfectly distinct. The defendant inserts and publishes a libel; the plaintiff prints and publishes the same libel. It is not averred that this is one act. Had it been proved, that, after the inserting and publishing of the libel in the *Court Journal* by the defendant, the plaintiff had re-printed and re-published it in another publication, the evidence would have supported the declaration. The averment of the plaintiff's innocence, therefore, does not extend to the act of which he was convicted, but merely to the act of which the defendant was guilty. [Lord Lyndhurst, C. B.—Is there any averment that the plaintiff was ignorant of the libel?] None. [Alderson, B.—You say there is nothing to connect the act of the defendant

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Arch. of Pleas, with the offence of which the plaintiff was convicted; but
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at the end of the count there is an averment, that "the plaintiff was so prosecuted as aforesaid, by reason and in consequence of the committing of the grievances by the said defendant as aforesaid."] This averment does not carry it any farther; it may have been by reason and in consequence of the defendant's inserting the libel, that the plaintiff, approving of it, afterwards published it himself; but this is immaterial, for, in the second count, there is no such averment.

The main question is, whether a person, convicted of a criminal offence, can claim an indemnity from another who has participated with him in the commission of that offence. The difficulty in the present case arises from supposing that the publication of a libel in a newspaper differs from the case of other offences. The law has pronounced it to be a criminal act, and, being so, it must be followed by all the usual consequences of a crime. [Lord Lyndhurst, C. B.—Suppose that *Colburn*, instead of having an information filed against him, had been sued in an action for damages.] The correct principle is this, that in all cases where the act done is a public wrong, a party connected with the commission of that act cannot claim either indemnity or compensation. The right to recover does not depend upon the form of proceeding, but upon the circumstance whether the offence is against the public or against an individual. When the law has once declared that a particular act, however innocent it may be in itself, shall be a crime, such act, if committed, must necessarily be followed by all the consequences of a crime. The law has made the proprietor of a newspaper criminally answerable for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge. If so, in contemplation of law he stands in the situation of a criminal; and he cannot aver in

a Court of justice, that he is in fact innocent of the offence, and entitled to the remedies which an innocent man may claim.

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Lord LYNDHURST, C. B.—It appears upon this record that the first act was done by the defendant *Patmore*, who inserted and published in the *Court Journal* the libel in question. This, according to the statement in the declaration, was followed up by the plaintiff, *Colburn*, printing and publishing what was so inserted by *Patmore*. It may have been that the latter was a totally separate act from the former, and this view is quite consistent with the record. But it is said, that there is an averment that the defendant inserted and published the libel without the knowledge or consent of the plaintiff. That averment may be very true, and yet, after the insertion, *Colburn* may have been so well pleased with the libel as to have published it again.

The question upon the merits, which we are not called upon to decide in this case, is one of very great importance. I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.

BOLLAND, B.—I am of the same opinion. At the commencement of the argument I took a different view of the general question from that entertained by the rest of the Court, and I did not adopt the principle upon which their opinion on that point is founded without considerable

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ALDERSON, B.—The plaintiff, in his declaration, alleges a duty on the part of the defendant, and alleges a breach of that duty in not performing and discharging the duties of editor of the *Court Journal* in a due and proper manner. He should then have proceeded to shew that the injury sustained by him was a consequence of the breach of duty alleged. This he has not done; for the injury sustained appears to have been the consequence of his own wilful act in printing and publishing the libel before inserted by the defendant in the *Court Journal*. Upon the general question, I coincide in the view of it taken by the Lord Chief Baron.

GURNEY, B.—It is quite clear, on the first point, that the plaintiff is not entitled to judgment upon this record; and, with regard to the other question, I certainly entertain a strong opinion.

Rule absolute (*a*).

(*a*) In *Poplett v. Stockdale*, 1 Ryan & Mood. N.P.C. 337, which was an action by a printer against the publisher of a libellous work, (*Memoirs of Harriette Wilson*), to recover for the printing, Best, C.J., says, “It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law,” and the plaintiff was nonsuited. Where the subject-matter in respect of which the plaintiff seeks to recover is tainted with illegality, it seems to be immaterial that the plaintiff was acting *bond fide*, and without any intention of transgressing the law. Thus, in an action to recover the value of corn sold by the *hobbett*, (forbid-

den by 22 Car. 2, c. 8,) it was held, that the plaintiff could not recover, although, as it was observed by the Lord Chief Baron *Alexander*, there was no doubt that the parties dealt *bond fide* with each other in making the contract, without any notion of taking advantage of the law at that time. *Tyson v. Thomas*, M'Clel. & Y. 119. So, in an action for coals sold and delivered, it appearing that the coal-meter had not signed the ticket pursuant to the statute 47 Geo. 3, c. 68, the vendor cannot recover. For the purposes of the act, Mr. Justice *Bayley* observes, the vendor and the meter are to be considered as the same person. *Little v. Pool*, 9 B. & C. 192. Again,

where the subject-matter in respect of which the plaintiff sues is tainted with illegality, he can found no claim upon it, although, as regards the person sued, he stands in a situation wholly free from fraud or blame. "It seems," says an eminent Scotch writer, "to be contrary to principle to hold, that, where the doing of an act is declared to subject the party to a penalty, the exaction of the penalty is the only consequence which follows from the performance of the act." "It may be true, that a penal statute is to be strictly construed; but it does not

follow from this that the party who has done the act is entitled to demand the aid of a Court of justice to enforce the performance of a contract founded upon that unlawful act." — *Brown on Sales*, 145. In *Farmer v. Russell*, 1 Bos. & Pul. 301, Mr. Justice Rooke says, "I think that a man who has been guilty of an indictable offence ought not to have the assistance of the law to recover the profit of his crime; and that, whether his agents be innocent or criminal, privy or not privy, his claim against those agents is equally inadmissible in a Court of law."

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PHILPOT v. ASLETT.

PLATT applied for a rule to shew cause why the judgment which had been entered up upon a warrant of attorney given by the defendant should not be set aside. The facts were these:—The defendant in the year 1831, being indebted to the plaintiff in the sum of 41*l.* 5*s.*, became insolvent, and took the benefit of the Insolvent Act. After his discharge, the defendant became again indebted to the plaintiff, and gave him a bill of exchange for the balance then due, including the debt incurred before his discharge. It did not appear whether the bill was given specifically for the old or the new debts; but the defendant had made various payments on account, which were sufficient in amount to cover the new debts. Being sued upon the bill, the defendant did not defend the action, but gave the warrant of attorney for the amount of the bill and the costs of the action. *Platt* relied in support of the rule upon the 61st section of the 7 Geo. 4, c. 57 (a).

After taking the benefit of the Insolvent Act, a debtor contracted a new debt, and accepted a bill of exchange for the balance of the old and new debt. Being sued upon the bill, he gave a warrant of attorney for the amount; and judgment being entered up upon this warrant of attorney, the Court refused to set it aside.

(a) See *Evans v. Williams*, 1 C. & M. 30.

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Tomlinson, who shewed cause in the first instance, contended that the application came too late. When the action was brought upon the bill, the defendant was bound, in case the bill was given in whole or in part for the debt in respect of which he had been discharged under the Insolvent Debtors' Act, to plead that fact; but having neglected to do so, and having given a warrant of attorney, he has abandoned the benefit given him by the 61st section of the Insolvent Act.

Per Curiam.—A bill of exchange is accepted by the defendant after his discharge under the Insolvent Act for the balance due upon both the old and new account. An action is brought *bona fide* upon that bill, and the defendant has the opportunity of pleading his discharge. Instead of so doing, he chooses to give a warrant of attorney, and now seeks to set aside the judgment upon that warrant of attorney. He has lost the proper opportunity, and cannot be relieved.

Rule discharged.

MAUDE *v.* SESSIONS.

In an action of covenant on a farming lease, the Court will not change the *venue* before issue joined.

CHANNELL had obtained a rule to shew cause why the *venue* in this case should not be changed from *Middlesex* to *Essex*. It was an action of covenant upon various covenants in a farming lease, upon which several breaches were assigned.

Knowles now shewed cause, and contended that the application to change the *venue* was premature, issue not having been joined; *Weatherby v. Goring* (*a*); and the defendant not having pleaded.

(*a*) 5 Dowl. & Ryl. 441; 3 B. & C. 552.

Channell, in support of the rule.—The ground for refusing the application in that case was, that the Court had no means of knowing what were the questions likely to be ultimately in dispute between the parties; but, if that information is before them, they will entertain the motion. Here the questions which must arise are known, for there are special breaches assigned in the declaration; and, whether the defendant pleads or lets judgment go by default, damages must be assessed on those breaches. Besides, the nature of the defence in this case appears by the affidavits. [Alderson, B.—*Non constat* that the plea may be in accordance with the affidavits.]

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Lord LYNDHURST, C. B.—There is no inconvenience occasioned by adhering to the general rule, which has been laid down in these cases. Before issue joined, the nature of the question, and the number and description of the witnesses required, cannot possibly be ascertained. For any thing that appears the defendant may plead a release to the whole. The party cannot suffer by our refusing the application; for, after issue joined, he may apply to a Judge at chambers.

The other Barons concurred, and—

The rule was discharged (*a*).

(*a*) See *Cotterill v. Dixon*, 1 C. & M. 661.

PERRY v. PATCHETT.

R. V. RICHARDS had obtained a rule to shew cause why the writ of summons in this case should not be set aside for irregularity. It appeared, that the action was brought to recover the value of a stack of hay sold by the

A stack of hay
was sold by the
defendant, with
liberty to keep
it on the defen-
dant's premises
for a certain

time, the hay was seized as a distress before the expiration of that time:—*Held*, that it was not necessary to indorse on the writ of summons sued out for the above cause of action the amount of debt and costs.

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defendant to the plaintiff, and which by the agreement of sale was to be allowed to remain on the premises of the defendant until *May*. In *March* the hay was seized under a distress for rent against the defendant.

Whately shewed cause, and contended that the rule 2 of *H. T. 2 Will. 4*, which was made applicable to writs of summons, &c., by the rule 5 of *M. T. 3 Will. 4*, only applied to an action for the recovery of a debt; but that here there was a further demand, *viz.* damages for being deprived of the right of on-stand upon the defendant's premises till *May*.

Richards, in support of the rule, said, that the action substantially was to recover a debt, *viz.* the value of the stack.

Per Curiam.—The defendant sold the hay to the plaintiff, and the latter was to have the use of the defendant's premises for a certain time, of which he has been deprived, and for that injury he is entitled to damages. The case therefore is not within the rule.

Rule discharged.

STUNNELL v. TOWER.

A personal demand is absolutely necessary before moving for an attachment for non-payment of costs.

R. V. RICHARDS had obtained a rule to shew cause why an attachment should not issue for the non-payment of costs pursuant to the Master's *allocatur*. It appeared from the affidavits that there had been no personal demand from the defendant; but that the person, who went to serve him with the *allocatur*, went to his house, and was not permitted to see the defendant, but heard his voice in the house, and served the plaintiff's daughter with the *allocatur*.

Heaton now shewed cause.

R. V. Richards was heard in support of the rule, and cited *Green v. Prosser* (a). *Exch. of Pleas,*
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Lord LYNDHURST, C. B.—The hearing the party's voice in the house carries the case no further than this, that he was at home when the daughter was served with the *allocatur*; and the question is, whether a service on the daughter is sufficient? This rule ought not to have been granted. The demand upon the daughter is of no avail. It is much better in cases of this kind, where the liberty of the subject is so deeply concerned, to adhere to the strict rule that personal service should be required. His Lordship added, that the Court was the more anxious to lay down this rule, as the case cited might be supposed to authorize a less strict practice.

The other Barons concurring—

The rule was discharged.

(a) 2 Dowl. P. C. 99.

TWIGG v. POTTS AND OTHERS.

TRESPASS.—The first count of the declaration stated, that the defendants broke and entered the dwelling-house

tels, and effects, of the plaintiff, to wit, &c. Fifth count for tearing away, severing, and removing divers fixtures of the plaintiff. Pleas—*first*, Not guilty; *secondly*, a justification to first count, taking the *goods and chattels* as a distress for rent due on a tenancy. Replication—denying the tenancy; and issue thereon. The Judge at the trial directed the jury that the justification covered the whole declaration; but the jury found a verdict for the plaintiff, with one farthing damages:—*Held*, that the justification was *prima facie* an answer to the seizing and carrying away in the first count; and that the plaintiff, if he intended to rely on some of the articles being fixtures, ought to have replied that fact; but that the justification was no answer to the trespasses stated in the fifth count:—*Held also*, that, as the jury had not acted according to the misdirection, but had given damages, the Court would not grant a new trial, on the ground of the misdirection.

Trespass.—
First count for
seizing and car-
rying away cer-
tain goods, chat-
tels, and effects

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of the plaintiff, and broke open divers, to wit, two doors, and *seized and took divers goods, chattels, and effects;* to wit, &c. &c. The second count stated, that the defendants broke and entered another dwelling-house of the plaintiff, and ejected and expelled him, &c. The third count stated, that the defendants seized, took, and distrained certain other goods, chattels, and effects of the like quantity, quality, description, and value as those in the first count mentioned, &c. The fourth count stated, that the defendants seized, took, and carried away divers other goods, chattels, and effects of the like, &c. (as in the third count). The fifth count stated, that the defendants broke and entered a certain other dwelling-house of the plaintiff, and *divers fixtures and effects* of the plaintiff, then and there being, to wit, &c., *tore away, severed, and removed*, and seized, took, and carried away the same, and converted, &c. Pleas—*first*, Not guilty, and issue thereon; *secondly*, as to the first count of the said declaration, *Actio non*, because they say that the plaintiff for a long time, to wit, for thirteen years next before and ending on a certain day, to wit, the 29th September, 1832, and from thence until and at the said time when &c., held and enjoyed the said dwelling-house and premises in the said first count mentioned, as tenant thereof to the said defendant, *J. Potts*, under and by virtue of a certain demise thereof, theretofore made, at and under a certain rent, to wit, &c., payable, &c. That heretofore, to wit, &c., a large sum, to wit, &c., of the rent aforesaid, for divers, to wit, thirteen years of the said tenancy, ending &c., became and was due, &c. &c. Wherefore the said defendant, *J. Potts*, in his own right, and the said other defendants, as the servants of the said *J. Potts*, and by his command, at the said time when &c., in the said first count mentioned, broke and entered into and upon the said dwelling-house and premises, in which &c., in the said first count mentioned, the outer door thereof being

open, for the purpose and in order to seize, take, and distrain the said *goods* and *chattels* in the said first count mentioned, as and for a distress for the said rent so due and in arrear as aforesaid, and took and seized the same thereon as such distress as aforesaid; and the same not being replevied, the said *J. Potts*, in his own right, and the said other defendants, as &c., sold and disposed of the said *goods* and *chattels* for and towards the satisfaction and discharge of the said arrears of rent, and the costs, charges, and expenses of the said distress, as they lawfully might, &c. The *third* plea was similar to the second, except in the statement of the amount of the yearly rent. Replication to the second and third pleas, denying the holding as stated. Upon these replications issue was joined. At the trial before *Park, J.*, at the last Assizes for the county of *Stafford*, it was proved that the defendants had not only taken away various goods and chattels, but also that they had displaced and removed certain fixtures. The defendants succeeded in establishing the tenancy put in issue by the special pleas. The learned Judge told the jury that he considered all that had been done by the defendants as one transaction, and that, in his opinion, the second plea was an answer to the whole of the plaintiff's case. The jury, however, found a verdict for the plaintiff, with damages *one farthing*; upon which the Judge certified, in order to deprive the plaintiff of his costs. In *Easter Term* last, *Jervis* obtained a rule for a new trial, on account of the smallness of the damages and the misdirection of the Judge.

Talfourd, Serjt., R. V. Richards, and W. J. Alexander, now shewed cause.—This is a rule obtained by the plaintiff to shew cause why a verdict, obtained by himself, should not be set aside. The only question is that which was raised by the special pleas, *viz.* tenancy or no tenancy; for, although those pleas are only pleaded to the first

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Exch. of Pleas, count of the declaration, yet that count enumerates specifically every article taken. No question either as to the breaking of the doors, or as to any of the property consisting of fixtures, is raised upon these pleadings; and that being the case, the pleas completely answer the plaintiff's demand; and, being found for the defendants, there ought, in fact, to have been a verdict for them according to the direction of the learned Judge, which was correct.

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Jervis and Whately, contrà.—The special pleas were no answer to the declaration, and there was a clear misdirection on the part of the learned Judge. The first count (to which they are pleaded) is for *seizing and taking divers goods, chattels, and effects*. Now, supposing *fixtures* to be included under the latter word, yet there is still a part of the declaration wholly unanswered, *vix.* the charge in the fifth count, that the defendants *tore away, severed, and removed* divers fixtures. The defendants could not justify this charge under the special pleas, for fixtures are not distrainable for rent. *Pitt v. Shew* (a). There are two distinct causes of complaint in the declaration, one of which might be justified under a distress, the other not; and the latter remained unanswered. Supposing that the defendants had chosen, as it was competent to them under the statute 11 Geo. 2, c. 19, to plead the general issue, instead of a special justification, can it be contended that evidence of the distress for rent would have been any answer to the charge of severing and removing the fixtures? It was not necessary for the plaintiff to reply to the special pleas that certain of the articles enumerated were fixtures. The plaintiff might, if he pleased, have abandoned his first count, admitting the facts therein stated to have been sufficiently

(a) 4 B. & A. 206.

justified, and have relied upon the fifth count, to which the general issue only was pleaded. That would be equivalent to a *nolle prosequi* as to one count, which leaves the others untouched (*a*). The learned Judge should have told the jury that there was no answer to the fifth count, and that they were to give reasonable damages to the plaintiff for those trespasses; but the jury, against his Lordship's directions, found a nominal verdict for the plaintiff, who ought not to suffer by this double mistake.

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PARKE, B. (*b*).—This rule was obtained on the ground of a misdirection on the part of the learned Judge who tried the cause, and can only be supported on that ground, the verdict being under 20*l.* The first count is for seizing and taking the plaintiff's goods, chattels, and effects, and under the latter word, according to *Pitt v. Shew*, fixtures are included. The second plea is pleaded to the whole of the first count; and though it was demurrable, yet, after verdict, it must be taken to be good. Had the plaintiff wished to take his case out of the operation of that plea, he ought to have replied that certain of the articles, the taking of which was justified as for a distress, were fixtures. That, however, he has not done; and, therefore, as to the *seizing and taking* all the articles, fixtures as well as goods, there is, so far as the first count is concerned, a complete answer given by the defendants. The only issue raised upon the special pleas was *tenancy*, and that was found for the defendants. The question with regard to the breaking of the doors became immaterial; but upon the fifth count a different cause of action is stated, and the plaintiff claims to recover for the tearing away, sever-

(*a*) *Moo. & M.* 311.

(*b*) Lord Lyndhurst was absent from indisposition.

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v.
PORTS.

ing, and removing of divers fixtures. To this charge there was no justification; and the learned Judge ought certainly to have left it to the jury to give such damages as they should think this latter trespass deserved. He did not give such a direction; but the jury rectified the mistake, took the whole case into their consideration, and found that the damages sustained by the plaintiff amounted to one farthing. Can we grant a new trial on the ground of a misdirection of the Judge, which has had no effect with the jury? It would be idle to send the case down for further inquiry.

The rest of the Court concurring, the rule was discharged.

Rule discharged.

RUSH v. SMITH.

Where a person called only to produce a document is sworn as a witness by mistake, and a question is put to him, which he does not answer, the opposite party is not entitled to cross-examine him.

TRESPASS for seizing and carrying away two horses and certain other property of the plaintiff. Plea—Not guilty.

At the trial before *Vaughan*, B., at the last *Lent Assizes* for the county of *Suffolk*, the officer who had made the distress for which this action was brought, was subpoenaed to produce the warrant of distress, and, being put into the box, was by mistake sworn; and the following question was put to him by the plaintiff's counsel—"Were you employed as bailiff, and had you any warrant?" but no answer was made. *Storks*, Serjt., for the defendant, insisted on his right to cross-examine the witness, as he had been sworn; but the learned Judge ruled, that, as he had not been examined, such right did not exist; and *Storks* afterwards called him as his own witness. A verdict having been found for the plaintiff, *Storks* obtained a rule for a new trial, on the ground that he had been improperly excluded from the cross-examination of this witness.

Austin shewed cause.

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v.
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Storks and B. Andrews, contrd.—It is a sufficient ground for a new trial that the defendant was excluded from a cross-examination of this witness. The utmost extent to which the rule has hitherto gone is, that, where a witness is called merely to produce a document and is not sworn, he shall not be subject to cross-examination; but here he was actually examined. [Gurney, B.—There was no answer given to the question put.] In *Phillips v. Eamer and Another, Sheriff of Middlesex* (a), a witness having been put into the box and sworn, but not examined, it was objected that he was not liable to cross-examination; but Lord Kenyon ruled, that, having been called, he should be examined.

ALDERSON, B.—The whole evidence has been fairly laid before the jury, though not in the order contended for by the defendant; and that being the case, there is no ground for disturbing the verdict. I do not say how I should have ruled had the question arisen before me. The practice is now well settled, that, where you call a witness under a *subpoena duces tecum*, and he produces the required documents, which he is bound to do at his peril, and you do not examine him, but identify the documents by other witnesses, the person producing the documents is not subject to cross-examination. I ruled accordingly in a case which occurred before me at *Carlisle*. Here, the witness was merely called for the purpose of producing the warrant.

GURNEY, B.—If the Court were to grant a new trial, it must take place under precisely the same circumstances as the last. It is not pretended that there is any other evidence upon which the jury can come to a conclusion. The

(a) 1 Esp. N. P. C. 357.

*Exch. of Pleas,
1834.*

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v.
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Court of *King's Bench* have lately decided (*a*) that they will not grant a rule *nisi* for a new trial, on the objection that a witness was compelled at *Nisi Prius* to produce a document, and was not allowed to be examined.

Rule discharged (*b*).

(*a*) Easter Term, 1834.

(*b*) In *Morgan v. Brydges*, 2 Stark. N. P. C. 314, the bailiff, who had executed the writ, was called to produce the warrant, and, being sworn, he produced and *proved* the warrant from the defendants. His cross-examination was objected to on the ground that this was, in fact, the witness's own suit, and not the sheriff's; but Lord *Ellenborough* permitted him to be cross-examined. It was not even urged here, that the witness was exempt from cross-examination on the ground of simple production, for he *proved* the warrant. Lord *Ellenborough* observed, that, since he had been called as a witness, he might be cross-examined. In *Simpson v. Smith*, 1 Phill. Ev. 260, (*a*), 6th ed., (an action for maliciously making a charge of felony), the plaintiff's counsel, having called upon the justice to produce the information, was proceeding to prove it by the justice's clerk, when it was insisted by the defendant's counsel that he should be allowed to cross-examine the justice; but *Holroyd*, J., held that this could not be done, and that the plaintiff's counsel might proceed to prove the information in the regular manner. Where, on an indictment for perjury, the attor-

ney for the prosecution was called and sworn, and produced a *copy* of a declaration in an action brought by the defendant against the prosecutor, but he was not asked any question on the part of the prosecution; on its being insisted that the defendant had a right to cross-examine this witness, *Abbott*, C.J., was of opinion, that, in strictness, the defendant was so entitled. *Rees v. Brooke*, 1 Stark. N. P. C. 472. That the other side cannot insist upon a person, who is called only to produce documents, being sworn, see *Davis v. Dale*, M. & M. 514; and *Rees v. Murlis*, Id. 515, (*a*); and *Evans v. Moseley*, 2 Dowl. P. C. 364. In the case of *Summers v. Moseley*, Hilary Term, 1834, the Court of Exchequer, after consulting the other Judges, determined that a party is not entitled to cross-examine a witness who is called by the other party merely to produce a document under a *subpana duces tecum*. This case was mentioned to the Court of *King's Bench*, in the case referred to, by Mr. Baron *Gurney*, which was the same case as that mentioned by Mr. Baron *Alderson*, and they considered the point so completely settled, that they refused to grant a rule *nisi*.

Exch. of Pleas,
1834.

THOMAS HOWELL, and THOMAS SCOTT, the Younger, As-signees of the Estate and Effects of JOHN WATERS and DAVID JONES, surviving Partners of ROBERT WATERS, deceased, Bankers, v. WILLIAM JONES.

ASSUMPSIT.—The first count of the declaration stated, that, heretofore, in the lifetime of the said *Robert*, and before the bankruptcy of the said *John* and *David*, to wit, on the 4th day of *January*, in the year of our Lord 1825, and from thence until and at the time of the death of the said *Robert*, they the said *Robert*, *John*, and *David* were carrying on the business of bankers in co-partnership, to wit, in the county of *Carmarthen*, and afterwards, and in the lifetime of the said *Robert*, and before the bankruptcy of the said *John* and *David*, to wit, on the day and year aforesaid, in the county aforesaid, in consideration that they the said *Robert*, *John*, and *David*, at the special instance and request of the said defendant, would open an account with and honour the cheques of one *Henry Bowers* on a certain account, to wit, an account to be called the “Mill Account,” he, the said defendant, undertook, and then and there faithfully promised the said *Robert*, *John*, and *David*, to be responsible to them for him the said *Henry*. And the said plaintiffs aver, that the said *Robert*, *John*, and *David*, confiding in the said promise and undertaking of the said defendant, did then and there, in the lifetime of the said *Robert*, and before the bankruptcy of the said *John* and *David*, open an account with the said *Henry* on the said mill account; and did afterwards, to wit, on the day and year aforesaid, and on divers other days and times in the lifetime of the said *Robert*, and before the bankruptcy of the said *John* and *David*, to wit, in the county aforesaid, honour divers cheques of the said

B., in *January*, 1825, gave the following guarantee to *A.*, a banker: “Please to open an account with, and honour the cheques of, *C.* on Mill Account, for whom I will be responsible.” The account was accordingly opened, and advances were made by *A.* It appeared to be the mode of dealing at the bank for the customers to give acceptances occasionally for the balance of their accounts. In *February*, 1827, *A.* ceased to make advances. In *October*, 1827, a payment into the bank was made by *B.* In *February*, 1828, (and not before), *A.* took *B.*’s acceptance at three months for the amount of his balance. It did not appear that *B.* had actual knowledge of the course of business at the bank, although he was solicitor to the bankers: — *Held*, that taking thereby discharged.

the acceptance was a giving of time to the debtor, and that *B.*, the surety, was thereby discharged.

Exch. of Pleas., **Henry** on the said mill account, and did at those several
1834.
respective times pay and advance on account of the
HOWELL said **Henry**, in respect of the said cheques and otherwise
v. on the said account, divers sums of money, amounting in
JONES. the whole to a large sum of money, to wit, the sum of
2000*l.* of lawful money of *Great Britain*, and exceeding
by a large sum of money, to wit, the sum of 1000*l.* of like
money, all the monies paid to, and had and received by,
the said **Robert, John, and David** by and from and on ac-
count of the said **Henry**, to wit, in the county aforesaid.
And the said plaintiffs aver, that the said **Henry**, although
often requested so to do, has not paid the said last-men-
tioned sum of money, or any part thereof, to the said **Ro-
bert, John, and David**, or any or either of them, in the life-
time of the said **Robert**, and before the bankruptcy of the
said **John** and **David**, or to the said **John** and **David**, or either
of them, after the death of the said **Robert**, and before
their bankruptcy; by reason of all which said several pre-
mises, the said **Henry** was indebted to the said **John** and
David after the death of the said **Robert**, and at the time
of their bankruptcy, to wit, on the 31st day of *December*,
in the year of our Lord 1831, in a large sum of money, to
wit, the sum of 1500*l.* of like money, in respect of the said
account so opened, and of the said several cheques so
honoured as aforesaid, to wit, in the county aforesaid.
And the said plaintiffs aver, that he, the said **Henry**, has
not at any time since the bankruptcy of the said **John** and
David paid the said last-mentioned sum of money, or any
part thereof, to them the said plaintiffs as such assignees as
aforesaid, or to either of them, although often requested so
to do, to wit, in the county aforesaid; of all which premises
the said defendant afterwards, to wit, on the 1st day of *Sep-
tember*, in the year of our Lord 1833, in the county afore-
said, had notice, and was then and there requested by the
said plaintiffs to be responsible to and indemnify them the
said plaintiffs as such assignees as aforesaid, for and in

respect of the said sum of money last mentioned, according to the said promise and undertaking by him in that behalf in manner aforesaid made; yet the said defendant, not regarding his said promise and undertaking, has not as yet been responsible to or indemnified the said plaintiffs assignees as aforesaid, for or in respect of the said sum of money last mentioned, or any part thereof, although often requested so to do, but has wholly refused and still does refuse so to do, and the said last-mentioned sum of money still remains wholly due and unpaid to the said plaintiffs assignees as aforesaid, to wit, in the county aforesaid. The declaration contained two other special counts, and counts for money paid, and upon an account stated. The defendant pleaded the general issue and the Statute of Limitations.

At the trial, before *Gurney*, B., at the last Assizes for the county of *Carmarthen*, the following facts were established in evidence:—Messrs. *Waters & Co.*, before their bankruptcy in 1832, carried on the business of bankers at *Carmarthen*. In the year 1825, *Henry Bowers*, a miller at the same place, having applied to Messrs. *Waters & Co.* to open an account with them, they assented, upon his giving them a guarantee. That guarantee was given by the defendant, and was in the following form:—

“ *Henry Bowers’ Mill Account.* ”

“ *Messrs. Robert Waters & Co.* ”

“ Please to open an account with and honour the cheques of Mr. *Henry Bowers* on Mill Account, for whom I will be responsible.

“ *W. Jones.* ”

“ *Carmarthen, 4th January, 1825.* ”

The defendant was an attorney, and was the professional adviser of Messrs. *Waters & Co.*, with whom he also kept a banking account. At the time of the gua-

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1834.

HOWELL
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HOWELL v. JONES.

rantee being given, he attended at the bank with *Bowers*, and requested that an account might be opened with the latter, which was opened accordingly, and advances were made from time to time by the bankers to *Bowers*. No advances were made by Messrs. *Waters & Co.* to *Bowers* after the month of *February*, 1827; but, upon the 30th *October* in that year, a sum of 141*l.* 10*s.* 9*d.* cash was paid by him into the bank to the credit of his account. After this payment the balance against *Bowers* amounted to the sum of 846*l.* 14*s.* 7*d.*, and for this amount Messrs. *Waters & Co.*, on the 26th *February*, 1828, drew a bill of exchange upon *Bowers*, payable three months after date, which was accepted by *Bowers*, and carried to the credit of his account, but was dishonoured at maturity. The writ in the present action was issued on the 25th *October*, 1833. It was proved at the trial that it was the course of business in the bank of Messrs. *Waters & Co.*, for the bankers occasionally to take the acceptances of their customers for the balance appearing to be due on the face of their accounts, which were termed *covers*; and this was also proved to be the practice with a neighbouring bank. It appeared that the defendant, as professional adviser to the bankers, had sometimes been consulted with regard to these acceptances; but it was not proved that he had personally any knowledge that it was the practice of the bank to require these bills as *covers* for the balances of their customers. A verdict having been found for the plaintiffs for 1027*l.* 6*s.* 11*d.*, with liberty to move to enter a nonsuit—

J. Evans accordingly, in *Easter Term*, obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered; and now—

Whitcombe, Follett, and Powell shewed cause.—There are two points upon which this rule has been obtained—

first, that the defendant, being a surety, has been discharged by time given to his principal; *secondly*, that the plaintiffs' demand is barred by the Statute of Limitations. The first question is one of very great importance to the interests of persons engaged in trade. It is not the case of a common guarantee for the payment of a specific sum, but an engagement to be answerable for a party with whom a banker opens an account. The parties entering into such an engagement must have contemplated the opening and carrying on of that account in the manner usual between the bankers and their customers; and if the practice of the banking-house was to require from those persons who kept accounts with them acceptances for the purpose of covering their balances, such a practice must have been in the contemplation of the parties at the time of the guarantee being entered into. This is obvious when the question is considered as if raised by the surety, who might certainly insist that the bankers should deal with his principal in the same manner as they are in the habit of dealing with their other customers. In a case of goods sold, where, by the custom of the trade, they are to be paid by a bill at three months, after a credit of three months—a person who has guarantied the payment, if he found that they had been sold upon a credit of three months simply, would have a right to say to the vendor—"I only engaged to pay you for the goods on default of the purchaser, in case you dealt with him in the usual manner, and, as you have chosen to vary from that manner, I am no longer responsible." In the same way the vendor is entitled to say to the surety—"You undertook to pay me for the goods on the default of the purchaser, in case I dealt with him in the customary way; and you have no right to say that I have given him time and discharged you, because I have given the credit which I always give to those who deal with me." The surety is bound to inform himself as to the usual course of deal-

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ing (a); for, where he undertakes to guaranty a transaction, he must be understood to guaranty it under the circumstances which ordinarily accompany such a transaction between such parties. But it is otherwise when new arrangements, not contemplated at the time of entering into the guarantee by any of the parties, are introduced. There the state of circumstances is altered, without the consent and without the contemplation of one of the parties, who may insist upon that alteration as foreign to his contract, and claim to be exonerated. This has been the state of things in all those cases in which it has been held that a surety is discharged. The giving time to the principal was, in those cases, never within the contemplation of the surety, and was an act done without his consent.

Applying these principles to the present case, it will be seen that no act was done on the part of the bankers which could have the effect of discharging the defendant. Admitting that he was not personally cognizant of the practice adopted by the bankers in requiring acceptances from their customers, it was his duty, in case he did not wish to be bound by their usual course of practice, to make inquiry into what that course was. By not doing so, he consented to become surety for an account conducted upon the usual footing; and he cannot now complain that the bankers have dealt with his principal in the same manner as they have dealt with all their other customers. That a surety shall be presumed to have informed himself of the mode of dealing between his principal and the creditor may be gathered from the case of *Coombe v.*

(a) With regard to transactions which take place after the guarantee given, (and the same rule seems to apply to the course of dealing), Mr. Justice Gaselee says—"A surety ought to know the nature of the engagement he has entered into;

and it is his fault if he neglect to inquire into the nature of the transactions between the principal and the party indebted after the guarantee given." *Goring v. Edmonds*, 3 Moore & P. 268; 6 Bing. 100, S. C.

Woolf (a). There the course of the plaintiff's business was to allow a credit of six months, or a discount of two and a half *per cent.* for cash.

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In the present case there has not been any giving of time to *Bowers*. The engagement is, that the defendant will be responsible if the bankers "will open an account with and honour the cheques of *Bowers*." Now, this is not a guarantee for any particular time, it does not cover the dealings between the bankers and their customers to a limited extent, or for a limited period, but is open and general. The defendant becomes responsible for their advances as long as they continue to make advances to him. The taking *Bowers's* acceptance neither extinguished the debt, nor extended the existence of it beyond the period contemplated by the guarantee. [Alderson, B.—Suppose, after the acceptance taken, the surety had applied to the bankers and said—"Sue *Bowers*," the answer must have been, that they were unable to do so until after the expiration of three months.] In this case the acceptance was taken merely as a cover or collateral security for the amount, and was intended to lie in the coffers of the *London* bankers till due.

With regard to the second question, whether the plaintiffs are barred by the Statute of Limitations, if the plaintiffs had a remedy against the principal at any time within six years, they would also have a remedy against the surety. The running of the statute is not to be reckoned from the time of the last advances made by the bankers, in *February*, 1827; for, on the 26th of *February*, 1828, when the bill was taken for the balance of the account, the bankers had clearly a remedy against the principal, and, therefore, against the surety also. As long as the principal is liable, the surety also is liable.

John Evans, and E. V. Williams, in support of the

(a) 8 Bing. 156; 1 Moore & Scott, 241, S. C.

Exch. of Pleas, rule.—Nothing like a custom of trade or course of dealing, with regard to the taking of acceptances from the customers of the bank, was proved in this case. That the practice was a very irregular one appears from the transaction in question. The account with *Bowers* was opened early in the year 1825; yet, neither in that year, nor in the following, nor in 1827, was any bill required by the bankers to cover the balance of the account. It was not until *February, 1828*, in the fourth year of the account, that any cover was demanded. If the bankers were at liberty to take this bill at the expiration of three years, why not of four, why not of five, why not of ten? But it is contended that there has been nothing done amounting to a giving of time. Now, what is the rule with regard to the relation between principal and surety upon this subject? It is thus laid down by Lord *Eldon* in *Samuell v. Howarth* (a), after remarking that the rule recognised by Courts of law is the same as that adopted in Courts of equity:—“The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not merely where the creditor is inactive; and, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have *the same* remedy against the principal as he would have had under the original contract.” Now, in this case, had the surety the same remedy against his principal after the giving the acceptance as before? In *February, 1827*, a balance was struck, and the surety might have called upon the bankers to enforce the payment, or, having paid it himself, might immediately have

(a) 3 Merivale, 278.

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sued the principal. But, upon the acceptance of the bill in *February*, 1828, the bankers, if called upon, could not have maintained an action against their customer till the expiration of three months, and, consequently, the surety had not the same remedy as he would have had. [Alderson, B.—The question is, beyond what period was there a giving of time in this case? No period is mentioned in the guarantee; and, if it was originally part of the contract between the bankers and their customer, that a bill should be taken for the balance as a cover, it is difficult to say that there was a giving of time.] The plaintiffs must contend, that, whenever there was a balance due, the bankers were bound to give three months' credit to *Bowers*. Here, however, the three months' credit was not given on the last balance being struck. The latest transaction between the parties was in *October*, 1827, and the acceptance was not taken until *February*, 1828. If this be allowed, why might not the bankers suffer the account to stand over for twenty years, and, at the expiration of that period, take the acceptance of their debtor for the amount, and so deprive the surety of the benefit of the Statute of Limitations? Upon the question of the Statute of Limitations, it is clear that the statute began to run from the time when the bankers refused to make any further advances to *Bowers*, *viz.* in *February*, 1827. At that period, they had a right of action against him, and, so far as respected their advances, the account was closed. The subsequent liability of *Bowers* upon his acceptance given in *February*, 1828, was not within the meaning of the guarantee, which only refers to the banking account. Nor can the payment by *Bowers* in *October*, 1827, make any difference; for there is no decision in which it has been held that a payment by a principal debtor, not being also a joint-contractor, operates to take a case out of the Statute of Limitations.

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Each. of Pleas, BOLLAND, B., now delivered the judgment of the
1834. Court:—

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This was an action brought against the defendant to recover the balance of an account due from one *Bowers* to the plaintiffs, and for which the defendant had given a guarantee in writing. The guarantee was dated 4th *January*, 1825, was signed by the defendant, and was as follows:

"Messrs. Robert Waters & Co.

"Please to open an account with and honour the cheques of Mr. *Henry Bowers*, on Mill Account, for whom I will be responsible. "W. Jones."

"W. Jones."

Under this guarantee the plaintiffs proceeded to make advances as bankers to *Bowers*, and, at the close of 1825, the balance due from *Bowers* to them amounted to £754
At the close of 1826, to 1037
At the close of 1827, to 846

Subsequently to *February*, 1827, no fresh advances were made by the plaintiffs to *Bowers*; but, on the 30th *October*, 1827, a payment of 141*l.* was made by *Bowers* to the plaintiffs. For the balance thus remaining due to the bankers at the close of 1827, they, in *February*, 1828, without the knowledge or assent of the defendant, took an acceptance of *Bowers*, payable three months after the date thereof. And the question now for the consideration of the Court is, whether, by so doing, they have discharged the present defendant from his liability as guarantee for the debt of *Bowers*. The case of *Combe v. Woolfe* (*a*) establishes that a plaintiff, who, without the knowledge or assent of the party, gives time to the principal debtor, by a contract made for that purpose between

(a) 1 Moore & Scott, 241, S. C.; 8 Bing. 156.

them, thereby exonerates altogether the surety from his liability; but the real question is, what is meant by "giving time?" We think it means extending the period, at which, by the contract between them, the principal debtor was originally liable to pay the creditor, and extending it by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent. In the case above cited, the surety undertook to guaranty a contract in which the debtor was to have eight months' credit, and was exonerated by the fact that the creditor had bound himself by taking a bill to give eleven months' credit for the balance due. In *Orme v. Young* (a), Lord Chief Justice Gibbs puts it thus:—"What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; not exacting the money at the time;" (by which of course he means at the time when due by the contract between the principal and the creditor); "but it is the act of the creditor depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a Court of equity for relief, because, the principal having tied his own hands, the surety cannot release them." If, however, the creditor continues to deal with the principal debtor on the original terms of the contract between them, he cannot, we think, by any length of credit which he so gives, be properly said to give time to the debtor. The time must be given as an extension of the original credit. If, therefore, it could be shewn, in fact, that the taking the three months' bill in this case, in *February*, 1828, from the principal debtor, was part of the original contract between the bankers and *Bowers*, for which the defendant became the guarantee, there would be much force in the arguments addressed to the Court on the part of the plaintiffs, that the defendant was bound to know the nature of the contract which he guarantied, and that

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(a) Holt, N. P. C. 84.

Exch. of Pleas, the course of dealing between the bankers and *Bowers* 1834.
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might be properly referred to for that purpose. But, giving them the full benefit of that argument, it is disposed of by the facts of the case. Here, a balance is struck in 1825, and no bill taken; the same takes place in 1826 and 1827, at which period all advances ceased on the part of the bankers. It cannot be for a moment doubted, upon the facts appearing on the learned Judge's report, that, in February, 1827, an action could have been maintained against *Bowers* for the balance then due. So, again, in October, 1827, after the payment of 141*l.* by *Bowers*, no one can doubt that the bankers could have maintained an action immediately for the then balance, either against *Bowers*, or, in failure of payment by him, against the defendant. Then, after this, by an agreement, to which the defendant is not privy nor an assenting party, the bankers bind themselves not to sue *Bowers* for that balance during the period between February, 1828, and May, 1828. We think this was clearly such a giving time to the principal debtor as to exonerate completely the surety from all subsequent liability. This renders it unnecessary to discuss the second objection:

The rule, thereupon, for entering a nonsuit, must be made—

Absolute.

FIDGETT v. PENNY.

On 5th February, an account was stated between the parties, and the balance was in favour of the plaintiff. On the 10th March another account was stated, and the balance was in favour of the defendant. The plaintiff afterwards sued upon the first account stated, and the defendant (after the new rules) pleaded *non assumpsit*:—*Held*, that, under this plea, he could not avail himself of the defence of the second account stated.

came into operation, was tried before the Secondary, in Arch. of Pleas,
1834.
 pursuance of a Judge's order, under 3 & 4 Will. 4, c. 17, when the plaintiff gave in evidence an account stated between himself and the defendant on the 5th *February*, upon the face of which a balance was due to him, and for this balance he claimed a verdict. In answer to this case, the defendant offered to prove, that, on the 10th *March*, the parties again met, when another account was stated between them, which included the sums for which the plaintiff had credit in the account of the 5th *February*, and also a sum of 11*l.* 11*s.* due from the plaintiff to the defendant, by which the balance was turned in the defendant's favour. The particulars of the plaintiff's demand coincided with the amount due on the account stated of the 5th *February*. After argument, the Secondary decided that the defendant was not entitled, under the plea of *non assumpsit*, to give the account of the 10th *March* in evidence; and the plaintiff had a verdict for 9*l.* 1*s.*, the balance due upon the first account, with liberty to the defendant to move to set aside the verdict for the plaintiff, and enter a verdict for the defendant. A rule having been obtained accordingly, or, in the alternative, for a new trial—

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Heaton was now heard in support of the rule.—He contended that the evidence of the second account stated ought to have been received, as shewing, that, at the time of the commencement of the action, the plaintiff had no right of action against the defendant on an account stated, having, in fact, stated an account, the balance of which was against himself. If this be not allowed, it will follow that where an account has been stated five years ago between the parties, with a balance in favour of the plaintiff, and fifty accounts have subsequently been stated, all of them shewing a balance in favour of the defendant, the plaintiff will yet be allowed to recover upon the first account.

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Lord LYNDHURST, C. B.—The plaintiff sued upon the first account, and the defendant, from the particulars of demand, must have known that it was upon the first account that the action was brought. Here is a clear cause of action. What is the answer? The defendant shews, that, before the commencement of the action, there was another account, including the former items, stated between the parties, and that the balance is in his favour. But, under the plea of *non assumpsit*, since the new rules, this is no answer to the action.

ALDERSON, B.—In law, the second account must be taken to be either a payment or a set-off; and in neither case could the defendant avail himself of those defences under the general issue.

GURNEY, B.—The case is perfectly clear; the rule must be discharged.

Rule discharged.

MESTAYER v. BIGGS.

The condition of a bond (after reciting that *M.* *M.*, the obligee, had contracted with *S. B.*, the obligor, for the sale to him, *S. B.*, of a meausage, &c., in consideration, amongst other things, of an annuity of 150*l.* to be paid to her, *M. M.*, during her life, by

DECLARATION in debt on bond, dated 10th October, 1826, with a penalty of 2000*l.*, conditioned for the payment to plaintiff of an annuity of 150*l.* by quarterly payments. Breach—Non-payment thereof for several quarters elapsed previously to the action. Plea—*Non est factum*, and issue thereon.

After verdict for the plaintiff, *Mansel* had obtained a rule *nisi* for a nonsuit on two points reserved at the trial—*first*, that the bond required enrolment under the

S. B., by four quarterly payments in the year; and further reciting that, on the contract of the purchase of the meausage, it was agreed, that, for better securing the payment of the said annuity, the said *S. B.* should execute that bond,) was, for the payment of the said annuity at the times, &c. This bond was stamped with a 1*l.* 15*s.* deed stamp:—*Held*, that the bond was properly stamped, and that it did not require any enrolment under the Annuity Act, and that if such enrolment had been necessary, the want of it could not have been taken advantage of under the plea of *non est factum*.

provisions of the Annuity Act; *secondly*, that the stamp, which was a common deed stamp of 1*l.* 15*s.*, was insufficient. The obligatory part of the bond was in the ordinary form. The condition was as follows:—"Whereas the above-named *Mary Mestayer* lately contracted with the above-bounden *J. Biggs*, for the sale to him, the said *J. B.*, of a messuage or tenement, outhouses, yard, garden, hereditaments, and premises, situate &c., in consideration of (among other things) an annuity or clear yearly sum of 150*l.*, to be paid to her the said *M. M.*, during the term of the natural life of the said *M. M.*, by the said *J. B.*, his executors or administrators, at or by four equal quarterly payments in the year, as hereinafter expressed. And whereas, on the contract of the said purchase, it was agreed, that, for the better securing the payment of the said annuity of 150*l.*, the said *J. B.* should execute the above-written bond or obligation, conditioned as hereinafter mentioned. Now, the condition of the above-written obligation is such, that, if the above-bounden *J. B.*, his heirs, executors, or administrators, or any or either of them, do and shall well and truly pay or cause to be paid unto the above-named *M. M.*, her executors, administrators, or assigns, one annuity or clear yearly sum of 150*l.* of good and lawful money of the United Kingdom of &c., of *English* value and currency, yearly and every year up to the last quarter's-day of payment preceding the decease of her the said *Mary Mestayer*, by four equal quarterly payments, on the 10th day of *January*, the 10th day of *April*, the 10th day of *July*, and the 10th day of *October*, in each year, at or in the common dining hall of the *Inner Temple, London*, between the hours of twelve and two of the clock in the day time; and also, in case the said *M. M.* shall happen to depart this life upon either of the said quarterly days of payment, then, if the said *John Biggs*, his heirs, executors, or administrators, do and shall, on demand, pay or cause to be paid unto the said *M. M.*, her executors,

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Eccles. of Pleas, administrators, or assigns, the whole of such quarterly payments, and do and shall make all and every the said payments without any abatement or deduction whatsoever, for or on account of any charges, taxes, rates, assessments, or other matter or thing whatsoever, whether by authority of Parliament or otherwise howsoever, and do and shall make the first payment of the said annuity or yearly sum of 150*l.* on the 10th day of *January* next ensuing the date of the above-written obligation, and do and shall pay up all costs, charges, and expenses which may have been incurred by reason of any default in payment thereof, then the above-written obligation shall be void, or else remain in full force and virtue."

Cowling shewed cause.—This case depends very much upon the recital, which shews that the annuity was given by way of part payment for a house purchased from the plaintiff by the defendant. As to the want of enrolment, independently of the answer that such an objection is not admissible under the plea of *non est factum*, it has been decided, and is now settled, that the Annuity Act, 53 Geo. 3, c. 141, does not apply to annuities granted without regard to pecuniary consideration. Here, the consideration for the sale, if it can be considered as a sale within the meaning of the statute, which is very doubtful, is a house. *James v. James* (*a*) is in point. This subject was very recently considered in *Cumberland v. Kelly* (*b*), where all the authorities are collected. As to the stamp, the clause which the defendant must rely on as being most applicable to the present case is under the head "Bond," in the first part of the schedule to the Stamp Act, 53 Geo. 3, c. 184, and is as follows:—"Bond in *England*, and personal or heritable bond in *Scotland*, given as the only or principal security for the payment of any annuity,

(*a*) 2 B. & B. 702; 5 Moore, 479. (*b*) 3 B. & Ad. 602.

upon the original creation and sale thereof.—See Conveyance upon the Sale of Lands, &c.” The clause thereby referred to, and found under the head “Conveyance,” is the following: “And where, upon the sale of any annuity or other right not before in existence, the same shall not be created by actual grant or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument by which the same shall be secured, or some one of such instruments if there be more than one, shall be deemed and taken to be liable to the same duty as an actual grant or conveyance.” Now, looking back to the commencement of the head “Conveyance,” it appears that a conveyance, whether grant &c. upon the sale of any lands &c., annuities &c., or of any right &c. therein, “where the purchase or consideration money therein or thereupon expressed shall not amount to &c.,” shall be stamped as therein mentioned, and must therefore be stamped according to the pecuniary consideration therein expressed. Here, no pecuniary consideration is expressed; besides which, there is no “sale” of an annuity here, within the scope of the Stamp Acts. They are to be construed in a popular manner. “Sale of an annuity” in the ordinary sense means a sale for a pecuniary consideration, since annuities are usually sold for the purpose of raising money; the word “sale,” therefore, in the Stamp Act must be read as confined to the cases comprised within the Annuity Act. Again, the annuity here was not sold for a house, but the house for the annuity. The object of the sale and of the whole transaction was the house; the annuity was only the consideration of that sale. If the subsequent clause, under the head “Bond,” be relied on, *viz.* “Bond in England, and personal or heritable bond in Scotland, given as a collateral or auxiliary security for the payment of any annuity upon the original creation and sale thereof,

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by any other deed or instrument, liable to and charged with the said *ad valorem* duty hereinafter imposed on conveyances upon the sale of any property—*l.*,” then the stamp is valid, being for a larger amount than required by the act. The two following clauses are the only others that can possibly be contended to be applicable; they do not however affect the present question, for they only apply to cases of bonds, not given on the original creation and sale of an annuity; whereas the recital of the condition shews that the present bond was given on the original contract for the annuity, and that it is the only instrument by which that annuity was created. The clause first cited is the only one therefore on which the defendant can rely, and that has been shewn not to apply; and, therefore this bond comes within the clause for stamping bonds and deeds in general, and is correctly stamped. In *Blandy v. Herbert* (*a*), Mrs. *Lewin* (being the owner of certain stock for her life, remainder to her daughter, the wife of the defendant,) by an indenture bearing a common deed stamp, it was arranged that the defendant should sell out the stock and pay Mrs. *L.* an annuity for her life equal to interest on the amount of the proceeds of the stock; and that certain policies of insurance should be assigned by way of further security. The stamp was objected to, on the ground of the transaction being a sale of an annuity and a conveyance of “property;” but Lord *Tenterden* said, that the transaction could not be considered as a sale of an annuity in the ordinary sense and acceptation of the words; and *Parke*, J., asked “what was the consideration money expressed in the deed. That language is applicable to the present case.

Mansel, contrà.—The case depends on the clause in

the schedule to the Stamp Act, under the head "Bond," which is as follows: "Bond in *England*, and personal and heritable bond in *Scotland*, given as a security for the payment of any annuity (except as aforesaid), or of any sum or sums of money at stated periods, (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life, or any other indefinite period, so that the whole money to be paid cannot be previously ascertained, where the same shall amount to 100*l.* and not amount to 200*l.* *per annum*—4*l.*;" which, therefore, ought to have been the amount of the stamp here. That clause is applicable, because there is no principal instrument creating the annuity. The exception, which means, "except upon the original creation and sale thereof," as in the clause preceding, shews that the clause applies to all cases where there is no other creation, and there appears to have been no other here. To hold the stamp sufficient in this case would enable parties to commit frauds on the Stamp Act, by reciting a prior creation of the annuity, where in fact none existed.

As to the other point, *Hill v. M. & S. Waterworks Company* (*a*) shews, that the objection as to the enrolment is admissible under *non est factum*; and although no sum is stated in the bond, yet the consideration for granting the annuity is in effect pecuniary.

PARKE, B.—I am of opinion that there is no foundation for either of the objections. As to the stamp, it is the proper one. On the face of the instrument, it is not a subsequent collateral security, but given originally; if so, it is to be stamped either as an original conveyance, or as a collateral security on the original conveyance. If it be an original security, there is no pecuniary consideration on the face of it, and, therefore, the clause imposing an *ad*

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valorem duty does not apply. If the defendant contends that it is a collateral security, then the stamp is too great. The subsequent clauses do not apply. The defendant then not being able to bring it within any special clause, it falls within the general bond clause, and is properly stamped with a common deed stamp.

The other objection is not available under a plea of *non est factum*. It is a general rule, that statutory objections must be pleaded. *Hill v. M. & S. Waterworks Company* was an entirely different case; the defendants there endeavoured to shew that the seal was not the company's. Besides, the transaction in this case is not within the scope of the Annuity Act. *Cumberland v. Kelley* is decisive on that point.

BOLLAND, B.—It appears to me that *Blandy v. Herbert* is decisive of the present case.

ALDERSON, B.—It is quite clear that this is a security given on the original creation of the annuity; and therefore, whether we look at the first or second of the cited clauses, the stamp is right for the reasons given by my Brother *Parke*.

GURNEY, B., concurred.

Rule discharged.

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JAMES SHEPHERD, RICHARD WOOD, NATHANIEL DORNETT, JAMES WEBBER, and EDMUND PONTIFEX, Assignees of the Estate and Effects of JOHN PLUMMER and WILLIAM WILSON, Bankrupts, v. MICHAEL KEATLEY.

THIS was an action brought by the plaintiffs, as assignees, against the defendant, for the breach of a contract entered into between the plaintiffs, as assignees, and the defendant, for the purchase by him, the defendant, of a certain leasehold estate. The declaration contained three special counts on the contract, and an *indebitatus* count for a leasehold estate bargained and sold, and for monies, and on an account stated. The defendant pleaded *non assumpsit*; and issue having been joined thereon, by the consent of the attorneys for the plaintiffs and for the defendant, and, by the order of Mr. Baron Parke, the following case was stated for the opinion of the Court, according to the form of the statute (a):—

On a sale by auction of leasehold property, one of the conditions of sale was, that the vendor "should not be obliged to produce the lessor's title," the vendee having *aliunde* discovered certain defects in the lessor's title:—*Held*, that notwithstanding the above condition, he was entitled to insist upon those defects.

Case.—“By indenture, bearing date the 21st day of March, 1816, and made between *John Crosse Crooke*, therein described, of the first part; *John Ellison*, therein described, of the second part; *Henry Bates*, therein described, and *Sarah his wife*, and *John Henry Bates*, son and heir apparent of the said *Henry Bates*, by the said *Sarah his wife*, of the third part; and *John Plummer*, therein described, of the fourth part; after reciting that the said *John Crosse Crooke*, *John Ellison*, *Henry Bates*, and *Sarah his wife*, and *John Henry Bates*, were seised of and entitled to the messuage or tenements and other hereditaments and premises thereafter particularly mentioned and described, and agreed to be demised in the shares or proportions following; that is to say, the said

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John Crosse Crooke to two equal undivided fourth parts or shares thereof, the whole into four equal parts or shares to be considered as divided; the said *John Ellison* to one other like equal undivided fourth part or share thereof; and the said *Henry Bates* and *Sarah* his wife, and the said *John Henry Bates*, to the remaining like one equal undivided fourth part or share thereof; and that they had agreed, for the consideration thereafter mentioned, and especially in consideration of the said *John Plummer* having undertaken to lay out the sum of £ — in erecting one or more substantial building or buildings of brick or stone on the said demised premises, in addition to or improvement of the buildings already standing thereon, each of them to demise to him the said *John Plummer* their several and respective parts or shares of and in the said messuage or tenement, hereditaments, and premises, subject as in the said indenture thereafter contained; it was witnessed, that, in pursuance of a license for that purpose, granted from the lord of the manor of *Vauxhall*, in the county of *Surrey*, and in consideration of the said sum of £ — so to be laid out by the said *John Plummer* in manner before mentioned, and of the rents and covenants thereafter contained, they the said *John Crosse Crooke*, *John Ellison*, and *Henry Bates*, and *Sarah* his wife, and *John Henry Bates*, did each and every of them, according to the part, share, and interest he, she, or they respectively had or might possess in the premises, demise, lease, set, and to farm let unto the said *John Plummer*, his executors or administrators, the said tenements and premises therein mentioned and particularly described, except as therein is excepted: To hold the same unto the said *John Plummer*, his executors and administrators, from the feast day of *St. Michael the Archangel* then last, for the term of fifty years from thence next ensuing, at the yearly rent of 50*l.*, in the proportions following, that is to say, to the said *John Crosse Crooke*, his heirs and assigns, or to such person or persons as for the time

being might be entitled to the reversion and inheritance of his said two undivided fourth parts or shares, the sum of 25*l.*, as his proportionate share of the said yearly rent; unto the said *John Ellison*, his heirs and assigns, 12*l.* 10*s.*, as his proportionate share of the said yearly rent; and unto the said *Henry Bates* for his life, and, after his decease, unto the said *Sarah* his wife for her life, and, after the decease of the survivor of them, unto the said *John Henry Bates*, his heirs and assigns, the sum of 12*l.* 10*s.*, as his, her, and their proportionate share of the said yearly rent of 50*l.*; payable quarterly, on the 25th December and the 25th March, the 24th June and the 29th September in every year, without any deduction on account of the land tax, or any other taxes, rates, &c., property tax only excepted. The said indenture, amongst other covenants and provisoies therein mentioned, contained a proviso, that he the said *John Plummer*, his executors, administrators, and assigns, should be at liberty to underlet the premises, or any part thereof, or to assign the term thereby granted of the same to any person or persons who should become party or parties to an indenture or indentures, and thereby enter into the said covenants and agreements with the said *John Crosse Crooke*, *John Ellison*, *Henry Bates*, and *Sarah* his wife, and *John Henry Bates*, their respective heirs and assigns, as were contained in the said indenture. [The case then stated that *Plummer* and *Wilson* became bankrupts; the conveyance by deed of the 30th December, 1880, from the commissioners to the provisional assignee; the appointment of the plaintiffs as assignees, and the assignment to them. The case then proceeded as follows:]—The said *John Crosse Crooke*, after the making of the first-mentioned indenture, and about the year 18⁸ , died, since which time the said two undivided fourth parts or shares of the rent aforesaid, which had been reserved payable to the said *John Crosse Crooke*, have been paid to and accepted by *Elizabeth*

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Exch. of Pleas, *Crooke*, his widow, (who has survived him, and is still living), but constantly under protest. The said *Henry Bates*, after the making of the first-mentioned indenture, and about the year 18¹, died, since which time the said undivided fourth part or share of the said rent aforesaid, which had been reserved payable to the said *Henry Bates*, has been paid to *Sarah Bates*, his widow, who has survived him, and is still living. The plaintiffs, on the 11th day of *May*, 1831, put up and exposed for sale by public auction, (amongst other property), the said premises, by the said indenture of the 21st *March*, 1816, demised as aforesaid, for the residue of the said term of fifty years then to come and unexpired, subject to (amongst others) the following conditions of sale:—‘The purchaser to pay down immediately a deposit of 20*l.* *per cent.* in part of the purchase money, and sign agreements for payment of the remainder on or before the 24th *June*, 1831; but should the completion of the purchases be delayed from any cause whatever beyond the period, the purchasers to pay interest at 5*l.* *per cent.* *per annum* from that time on the balance of the purchase money, and be entitled to the rents and profits of such of the lots as are let from the said 24th day of *June*. That the vendors should deliver an abstract of the lease, and of the subsequent title under which the leasehold lots are held; *but shall not be obliged to produce the lessors' title.*’ The defendant was the highest bidder for the said premises at the said sale, and was declared to be the purchaser thereof for the sum of 820*l.*, whereupon, in pursuance of the said conditions, he paid down the sum of 164*l.*, being a deposit of 20*l.* *per cent.*, in part of the said purchase money, and also signed an agreement for the payment of the remainder and the completion of the said purchase, according to the said conditions of sale. The plaintiffs afterwards delivered an abstract of the lease and of the subsequent title under which the said premises are held, and subsequently tendered to the defen-

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dant a certain indenture of assignment, purporting to assign the said premises to the defendant for the residue of the said term of fifty years; but the defendant refused and still refuses to accept the same. On investigating the title of the vendors, the following are the facts relating to the same, and which it is contended on the part of the defendant render the same title insufficient:—The demised premises were, at the time of executing the said lease, copyhold of inheritance; and a customary tenement of the manor of *Vauxhall*, in the county of *Surrey*, and in which, by custom, any estate or interest in a copyhold tenement, may be demised for a term exceeding one year, provided the previous license of the lord in writing for the granting the lease has been duly obtained; but without such license, by the custom of the said manor, a lease for the term of more than one year is cause and ground of forfeiture of the demised estate to the lord. The said *John Crosse Crooke*, one of the said lessors, had only an estate for life in the said demised premises, under a settlement made on his marriage with *Elizabith Parry*, spinster, and dated the 14th *March*, 1776, with a power to lease the said premises by indenture of lease under his hand and seal, and subscribed and sealed by him in the presence of two or more credible witnesses, and that the lease in this case was, as to his signature, witnessed only by one single witness, and which power is in the words following:—‘ Provided also, and it is hereby further declared and agreed, by and between all the said parties to these presents, that it shall and may be lawful to and for the said *John Crosse Crooke*, at any time or times during his natural life, and also to and for the said *Elizabith Parry*, the daughter, in case she shall happen to survive him, at any time or times during her natural life, and also to and for the said *Thomas Pritchard* and *Richard Whishaw*, their heirs, executors, administrators, and assigns, during the respective minorities of the child or children of the said intended marriage,

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by indenture or indentures under their hands and seals, respectively subscribed and sealed by him, her, or them in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the freehold, copyhold, or leasehold messuages or tenements, lands, hereditaments, and premises hereinbefore mentioned, and intended to be hereby respectively granted, released, assigned, and covenanted to be surrendered as aforesaid, unto any person or persons who shall be willing to take the same, either upon building or repairing leases, or otherwise, for any term or number of years in possession, reversion, or remainder, without taking any fine, premium, sum or sums of money for the same, at the best and most improved yearly rent or rents, payable quarterly or half yearly, that can or may be reasonably had or gotten for the same, so as no such lessee or leasees be made punishable of waste by any express words therein, and so as there be contained in every such lease a clause or condition of re-entry for non-payment of the rent or rents thereby to be reserved and made payable, with all usual and reasonable covenants; and so as the lessee and lessees, to whom such lease or leases shall be made, do seal and deliver counterparts of all such leases.' The said *John Ellison*, another of the said lessors, before obtaining the license to demise hereinafter stated, and before executing the said lease, *viz.* on the 17th November, 1814, duly surrendered all his estate and interest in his fourth part of the said demised premises, on his marrying *Susannah Smith*, to trustees, *John Henry Bates* and *George Whittingham*, in fee, in trust for himself for life, with remainder over; and the said trustees were, on the 10th November, 1815, duly admitted; and the said *John Ellison* had no legal estate or interest in the said premises at the time of his executing the said lease. The license obtained from the lord of the manor for the said *John Crosse Crooke* and *John Ellison* to demise the said premises, or grant a lease

thereof, was dated the 1st of *April*, 1815, and only for a term not exceeding forty years from *Lady-day* then next; but the lease is granted for a term of fifty years from *Michaelmas* then last (1815), and a copy of which license is as follows:—[The case here set out the licence.] No licence whatever was obtained for the said *Sarah Bates*, and her son, *John Henry Bates*, in his own right, nor for the said *John Henry Bates* and *George Whittingham*, as the trustees of the said *John Ellison*, to execute the said lease, or otherwise to demise their interest or either of their interests in the said premises for any term whatever. At the time of the said defendant's signing the said agreement of purchase, the said *Elizabeth Crooke*, the widow of the said lessor, *John Crosse Crooke*, then dead, was legally entitled to the following estate and interest in the said demised premises, *viz.* to an estate for life only, under the said settlement of the 14th *March*, 1776, with power of leasing; and, on the 3rd *August*, 1831, Mr. *Barker*, her solicitor, sent to the defendant's solicitors a letter, of which the following is a copy, but no proceedings have yet been taken in consequence thereof:—

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" Understanding that you are the solicitors for the landlord of the *Greyhound* public-house at *Streatham*, who purchased by auction the lease held by Mr. *Plummer*, I think it proper to inform you, that the validity of that lease is questioned by Mrs. *Crooke*, the tenant for life of an undivided moiety of the property.

" To Messrs. Young & Co. " I am, &c.

Blackman-street." " *G. Barker.*

"The defendant, therefore, refuses to complete his contract, on the ground that the lease was invalid, and on the ground that no perfect or secure legal title to hold and enjoy the said premises for and during the residue of the said term of fifty years could, under the circum-

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Maclean, for the plaintiffs.—The plaintiffs, who are assignees of a bankrupt, and who cannot therefore be taken to be cognizant of the vendor's title, have done all they were bound to do by the conditions of sale. [Lord *Lyndhurst*, C. B.—The question is, not whether the plaintiffs were bound to produce the lessors' title, but whether the defendant was precluded from taking objections to it.] The clause in question was intended to protect the vendor from any objection to the lessors' title, and, in substance, it has the same operation as the clause in *Spratt v. Jeffery* (*a*). There the words were, "and the said *W. S.* doth hereby agree to accept a proper assignment of the

(*a*) 5 Mann. & Ry. 188; 10 B. & C. 249.

said two leases and premises as above described, without requiring the lessor's title." There, *Bayley*, J., says, "The fair and reasonable construction of those words is, that the purchaser shall not be at liberty to raise any objection to the lessor's title. By the purchase of a bad lease the party *may* derive the same benefit as if it were good; and, if he cannot, the lessee or his assignee has a remedy over against the grantor of the lease." *Parke*, J., says, "For the plaintiff it is contended, that he is, nevertheless, at liberty to object to the lessor's title, although the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained." Unless the clause in question has the same operation as that in *Spratt v. Jeffery*, it will not, in fact, be a protecting clause. In purchasing from the assignees of a bankrupt lessee (*a*), the purchaser must have known that the vendors never intended to warrant the lessor's title. The very insertion of a clause like this in conditions of sale, shews that there are suspicions with regard to the title, of which the vendors do not choose to run the risk. It was long a *veraqua queratio*, whether, where there was no special stipulation on the subject, the vendor was bound to produce the lessor's title; but that question was settled by the decision of *Richards*, C. B., in *Purvis v. Rayer* (*b*). In that, and in the other equity cases, there is a distinct reference to a clause like the present, which is treated as a protecting clause, exonerating the vendor from the consequences of any defects in the lessor's title (*c*). *White v. Foljambe* (*d*); *Deverell v. Lord*

(*a*) See *Pope v. Simpson*, 5 Ves. 145, 147, n.; *Deverell v. Lord Bolton*, 18 Ves. 512.

(*b*) 9 Price, 118.

(*c*) *Richards*, C. B., says—"It is said that it is now the usual course to state in the advertisement for the sale of such proper-

ty, that the title of the lessor will not be warranted. That may be so, and the leases may be purchased on such terms, if purchasers are to be found who will buy them with so much rashness." 9 Pri. 521, 522.

(*d*) 11 Ves. 337.

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Exch. of Pleas, Bolton (a). In *Denev v. Deverell (b)*, which arose out of the case of *Deverell v. Lord Bolton*, Lord *Ellenborough* treated a clause of this nature as rendering the vendor *secure*. He says:—"A practice has very properly sprung up amongst auctioneers, in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called upon to shew the lessor's title. The plaintiff (the auctioneer) was bound to take notice of the practice, and to insert such a clause in the particulars of sale of the defendant's house. Had this been done, the defendant would have been *secure*, and Lord *Bolton* must have completed the purchase. By the omission, the defendant has the house thrown back upon his hands, with expensive litigation." [Alderson, B.—The Court has no doubt upon the question as to the production of the lessors' title. The point is, whether the purchaser may not take advantage of objections discovered by himself.] The purchaser buys the lease, with all its infirmities, from the assignees of a bankrupt, and that lease, on the face of it, shews a good title. In *Spratt v. Jeffery* it was admitted that the lease was bad; and the present case comes within the authority of that decision.

Platt, for the defendant.—The whole question arises upon four lines of the case, and comprises two points, *viz.* the subject-matter of the sale, and the terms of the contract. The case differs from *Spratt v. Jeffery* in both particulars. With regard to the first, the purchaser, in *Spratt v. Jeffery*, agreed to purchase "the two leases and good-will in trade of the house," &c. He therefore specifically engaged to purchase those leases, whatever might be their validity. Here, there is no agreement to purchase the lease. The subject-matter of the contract, therefore, is different. Then the words of the protecting clause in

(a) 18 Ves. 505.

(b) 3 Campb. 451.

Spratt v. Jeffery are much stronger. "Without requiring the lessor's title" is an engagement that no question shall be raised as to its validity; but that is very different from the vendor "not being obliged" to produce his lessor's title, which is merely a stipulation to prevent the inconvenience which requiring such a production might create. In the present case, after the sale, a notice was given by one of the parties entitled to take advantage of the defect in the lease; and can it be pretended that the purchaser shall be compelled to take to the title in the face of that objection?

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Lord LYNDHURST, C. B.—The whole case depends upon the construction of the words—"shall not be obliged to produce the lessor's title;" and it seems to me that those words mean nothing more than that there shall be no obligation upon the vendor to produce, for the satisfaction of the purchaser, any evidence of the lessors' title; but that they do not preclude the purchaser from taking any objection, derived from another source, to the validity of that title. It is frequently a matter of great inconvenience to the lessee to produce evidence of the landlord's title, and from this inconvenience the clause in question protects him. Of *Spratt v. Jeffery* it is sufficient to say, that the words of the clause in that case are very distinguishable from those in the present. The construction put by the Court upon the words there used was, that they operated as a waiver of the objection; but there is nothing to shew that the parties in the present case had any intention of the kind. I do not say what my own opinion would have been upon the words of the clause in *Spratt v. Jeffery*. It is sufficient to distinguish them from the words here used.

BOLLAND, B.—I am of the same opinion. *Spratt v. Jeffery* does not govern this case. The clause here has a sufficient operation in protecting the vendor from the in-

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ALDERSON, B.—I also am of the same opinion. *Spratt v. Jeffery* was a case not merely of a waiver of producing the lessor's title, but a waiver of that title altogether. Mr. Justice *Littledale* there says—“The main difficulty arises from the words, ‘without requiring the lessors' title.’ Taking the agreement altogether, I am disposed to say, that the defendant contracted to sell a qualified title only.” Possibly, upon the words there used, I might not have come to the same conclusion as the Court of *King's Bench* did; but it is unnecessary to give an opinion upon that point, as those words differ from the expressions employed here. The not being “obliged” to produce the lessors' title merely confers upon the vendor the power of enforcing the contract without producing or giving evidence of that title, but that expression cannot prevent the purchaser from taking objections discovered by himself. There is another point:—This is a case stated under the provisions of the new act, and there appears to be a plea of the general issue. Now, under that plea, the defence in question could not have been given in evidence.

GURNEY, B.—I am of the same opinion. If the vendor meant to protect himself at all events from the defects in his lessors' title, he ought to have used unambiguous language.

Platt then prayed that judgment of *nolle prosequi* might be entered under the new act (*a*), which the Court directed accordingly.

(*a*) 3 & 4 Will. 4, c. 42, s. 25, by which it is enacted, that the parties may agree, &c. to a special case, and may agree "that a judgment shall be entered for the plaintiff or defendant, by confes-

sion, or of *nolle prosequi*, immediately after the decision of the case, or otherwise, as the Court may think fit; and judgment shall be entered accordingly."

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THIS was an action of trespass, tried before the Lord Chief Baron at the last assizes for the county of *Surrey*, when a verdict was found for the defendant. Amongst other witnesses called for the defendant were two persons, named *Churchill* and *Pizzeys*, both of whom it became necessary to release in order to render them competent witnesses. When the release was produced, it appeared that it had been originally prepared as a release to *Churchill* only, but a doubt arising, during the trial of the cause, whether it was not also necessary to release *Pizzeys*, the instrument was altered by inserting his name, and making the rest of the deed conformable to that alteration. Before that alteration, it had been executed by the defendant, but delivered to *Churchill*, who was ignorant of the existence of the instrument, which had never been out of the possession of the defendant's attorney. After the alteration, the release was again executed by the defendant. Upon its production it was objected, that, at the time of the first execution, it became a perfect deed, and that the stamp having been once used, upon the insertion of *Pizzeys*' name and the re-execution of the instrument, a fresh stamp became necessary. The learned Judge overruled the objection, and the defendant had a verdict. In *Easter Term*, *Platt* having obtained a rule for a new trial, on the above ground—

The defendant executed a release to one of his witnesses in the usual manner, and gave it to his attorney. At the trial it appeared that another witness would require to be released. His name was accordingly inserted in the release, and the defendant re-executed it before it had been delivered to either witness: —*Held*, that this re-execution did not make a fresh stamp necessary.

Quare, whether one stamp is sufficient on a release to two witnesses?

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Adolphus, and *Thesiger*, shewed cause.—The only question is, whether the witnesses were duly released? Now, an instrument altered while it is *in fieri*, and before it is completed, does not require a fresh stamp, for the stamp with which it is impressed has never been used. This has frequently been held in the case of bills of exchange and promissory notes. Thus, where *A.* and *B.*, for a debt due to *C.*, agreed to give him a bill of exchange, to be drawn by *A.* and accepted by *B.*, but, instead of this bill, sent a promissory note made by one, and indorsed by the other, which *C.* immediately returned to be changed into a bill of exchange according to the agreement; the instrument so altered was held not to require a fresh stamp, as it had never been negotiated in the shape of a promissory note. Lord *Ellenborough* observed, that every thing continued *in fieri* till the alteration, and that the stamp was not occupied till then. *Webber v. Maddocks* (*a*). The same principle was acted upon with regard to a bond in the case of *Matson v. Booth* (*b*). That was a case of a bond of indemnity, which had been prepared in the name of four obligors, and had been executed by them; but, on being tendered to the sheriff, the obligee, it was objected to by him on the ground that there should be a fifth obligor added. The name of another obligor was accordingly inserted, and the bond having been executed by him, it was held not to require a new stamp. Mr. Justice *Bayley* said—“With respect to the objection upon the stamp, I am not aware of any case like the present, in which it has been held that a new stamp is necessary. If a bill be altered whilst it is still in the drawer's hands, before it gets into circulation or is accepted, it has never been con-

(*a*) 3 Campb. 1. A bill is not issued, so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon. *Downes v. Richardson*, 5 B. & Ald. 674; 1 Dowl. &

Ryl. 140. See also *Kennerley v. Nash*, 1 Stark. 452; *Jacobs v. Hart*, 2 Stark. 45; *Stevens v. Lloyd*, M. & M. 292.

(*b*) 5 M. & Sel. 223.

sidered that a new stamp is requisite. Otherwise, if it has been accepted; for then it is a complete bill. Now here, the bond was never out of the hands of the obligor, but remained with his agent, and never passed to the obligee. As my Lord has remarked, all was *in fieri*. The bond was in the nature of an escrow only." So, where a marriage settlement had been executed by the conveying party, but before the execution by the other parties, upon an objection being raised, an alteration was made, and the deed was re-executed by the conveying party, it was held not to require a new stamp. *Jones v. Jones* (a). In *Doe dem. Garnons v. Knight* (b), it is said, that the delivery of a deed to a third person, for the use of the party in whose favour the deed is made, *when the grantor parts with all control over the deed*, makes it effectual from the instant of such delivery. From this it must be implied, that, until the grantor parts with his control over the instrument, the delivery is not complete, and it remains still *in fieri*, and subject to alteration. In *Johnson v. Baker* (c), a composition deed was fully executed in the usual manner by a surety; but there having been a previous conversation, in which it was stated that the deed should not operate unless all the creditors signed it, it was held only to operate as an escrow. In *Shepherd's Touchstone* (d), a distinction is taken between the delivery of a deed to a stranger and a delivery to the party; and it is said, that, if a deed be delivered to a stranger, without any declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems not a sufficient delivery; and yet, if an obligation be made to the use of a third person, expressed in the deed, and the obligor deliver it to him to whose use it is made, this is said to be a good delivery. It is manifest from this, that, while in the possession of the party making it, the

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(a) 1 C. & M. 721.

(c) 4 B. & A. 440.

(b) 5 B. & C. 671.

(d) Vol. I, p. 58, Preston's ed.

Exch. of Pleas, deed is not considered as complete. In *Comyns's Digest* (a), it is laid down, that, "if it be delivered as his deed, to a stranger, to be delivered to the party upon performance of a condition, it shall be his deed presently;" but there, the person making the deed parts with the possession; and besides, the authority of the passage in *Comyns* was denied by the Court in *Johnson v. Baker* (b).

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Platt, contrâ.—The deed of release to *Churchill* having been delivered and attested with due formality, became a perfect deed for all purposes; and the stamp, having been thus once occupied, could not be again used. No distinction can be taken between a release like this and any other deed, as for the conveyance of lands; and in such a case the estate would have passed upon an execution like the present. Suppose the release in question produced after the lapse of thirty years, it would appear to be a perfect deed, regularly executed and attested, and would prove itself. [Lord *Lyndhurst*, C.B.—No doubt it would be *prima facie*, a perfect deed; but would that preclude the opposite party from shewing that it had never been delivered out of the releasor's hands?] If once duly executed, and operative as a deed, nothing can alter that operation. [Lord *Lyndhurst*, C. B.—It is quite clear that it was never intended to operate as a release, unless the persons named in it were called as witnesses.] If it did not originally operate as a deed, when did it begin to operate as such? If an agreement for the lease of a house be executed by two parties, and within half an hour after its execution, and before it is acted upon, an alteration is made in it, would it not require a fresh stamp? [Lord, *Lyndhurst*, C. B.—Here the releasee

(a) *Fait* (A. 3.) See *Taw v. Bury*, 2 Dyer, 167 b; 5 B. & C. (b) 4 B. & A. 442.

knows nothing of the deed, which is never delivered out of the possession of the releasor's attorney. *Alderson*, B.—In *Matson v. Booth*, Mr. Justice *Bayley* says, that the instrument was in the nature of an escrow only. May not an escrow be altered?] Before it could be given in evidence, an escrow would require to be stamped, and after being stamped it could not be altered. The cases referred to do not govern the present. The decisions relating to bills of exchange and promissory notes are founded upon the negotiability of those instruments, which are not considered perfect until put into circulation. [Lord *Lyndhurst*, C. B.—The cases on bills of exchange are referred to by the Court in *Matson v. Booth*.] *Johnson v. Baker* was a deed *inter partes*, and, though executed by one party, was not executed by the others, and, until the execution by them, might correctly be considered as incomplete (a). In *Matson v. Booth*, there was a blank left for the name of a fifth obligor, and the bond had not been executed by the obligee, so that there the instrument was obviously incomplete. This, on the contrary, was the case of a deed poll. [Lord *Lyndhurst*, C. B.—In these cases the question is, whether, taking into consideration all the circumstances of the case, the matter was or was not *in fieri*. Now, what was the object with which the deed was executed here? It was only in order, that, if necessary, it might be produced at the trial. Before its production it was found requisite to insert in the release the name of another witness. Are not these circumstances as strong to shew that the deed was still *in fieri* as those in *Matson v. Booth*?] The object in that case was not carried into effect till all the sureties were inserted to the satisfaction of the sheriff; but here, the original object,

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(a) As to the effect of alterations in a deed after the execution by one party, and before execution by the others, see *Doe d. Lewis v. Bingham*, 4 B. & A. 675.

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 perfected at the time of the first execution. The inconvenience of holding, that an alteration like this might be made without a fresh stamp would be very great. If altered in the name of the releasee, it might be altered in that of the releasor; and, if kept in the pocket of the attorney, might be made to serve in a succession of causes, provided its actual production was not required.

Cur. adv. vult.

Lord LYNDHURST, C. B., now delivered the judgment of the Court.—This was an application for a new trial, on the ground that improper evidence had been received. The question turns upon this point. It had been deemed necessary that a witness should be released, and, accordingly, a deed was prepared and executed in the usual form, and was handed over to the attorney of the party releasing, to be given to the witness if it should become necessary at the trial. Previously to its being used, it occurred to the counsel that another witness might be necessary, and, accordingly, the deed was altered by the insertion of the second witness's name, and by the adaptation of the words of the deed to that insertion. Being thus altered, it was re-executed before it was delivered to the witness. It might have been a question how far the stamp would have been sufficient for a release to both the witnesses; but the objection taken at the trial was, that the stamp, having become *functus officio* by the first execution, could not be again used. No doubt, if the deed had, in the first instance, been so completely executed as that the stamp was once occupied, no further use could have been made of it, and a re-execution would have required a fresh stamp. But so long as it remained *in fieri* it was not completely executed, and the stamp was not oc-

cupied. In *Matson v. Booth* (*a*), the bond had been executed by the plaintiff and the four sureties in the usual manner, and tendered to the sheriff; but the Court observed, that all was *in fieri*, and in the nature of an escrow only. In that case, as well as in the present, the bond was delivered in the usual form of words. In *Murray v. Earl of Stair* (*b*), it was held, that, in order to make the delivery conditional, the conclusion was to be drawn from all the circumstances of the case. The distinction between the execution of a deed being *in fieri* or being complete, was likewise taken in *Jones v. Jones* (*c*). These cases are decisive with regard to the objection which was taken at the trial; the deed, though completely executed in point of form, was placed in the hands of the attorney only to be used in case it became necessary. We think that, under these circumstances, the execution of the deed in question was *in fieri* only, and that the re-execution did not make a new stamp necessary. Whether one stamp would have been sufficient for a release to two persons may well be doubted, but that objection was not taken at the trial. If it had been then taken, it might probably have been removed by procuring a fresh stamp; and we are all of opinion that the rule must be discharged.

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Rule discharged (*d*).

(*a*) 5 M. & S. 223.

(*b*) 2 B. & C. 88; 3 D. & R. 278.

(*c*) 1 C. & M. 721.

(*d*) In *Colton v. King*, 2 P. Williams, 358, which was the case of a voluntary deed made by a party in favour of her children, the Lord Chancellor says, "As to the Lady Colton, if she had executed these deeds, *and kept them in her own hands or custody*, and they

had been got from thence, I do not think that she would have been bound by them; so, if they had been placed in the hands of her agent, for her agent's hands are her hands." See also *Murray v. Earl of Stair*, 3 D. & R. 278; 2 B. & C. 82. As to the effect of the re-execution of a deed, see *Coke d. Brummell v. Radcliffe*, 2 J. B. Moore, 495.

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See also *Hudson v. Revett*, 5 Bing. 363; 2 M. & P. 663, S. C. In the latter case, *Best*, C.J., says, "I beg not to be taken as deciding, that, if a deed be altered with the consent of all the parties after it is executed, it is not to be considered a good deed. I think if we are driven to examine that question, it would be found that in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered

shape, be a good deed." It does not appear, however, that the learned Chief Justice, on delivering this opinion, had the objection with regard to the stamp laws in contemplation. However, in *Mastson v. Booth*, *Holroyd*, J., seems to have viewed the case in the same light. He says, "When the bond was tendered, it was an available security with sufficient sureties, and the addition of the other obligor was by the consent of all parties."



RICHARD *v.* ISAAC.

An affidavit on the part of the defendant, which is intitled *C. D.* (the defendant) at the suit of *A. B.* (the plaintiff), cannot be read.

CHILTON moved for judgment as in case of a nonsuit, upon an affidavit intitled "*Thomas David Isaac, at the suit of John Richard.*" He submitted, that the cause was sufficiently designated by the words "at the suit of," which are the words always used in a plea.

GURNEY, B. (a).—The affidavit must be intitled in the cause; the usual and proper mode of intitling it is "*A. B. v. C. D.*"; the present is a deviation from the usual mode, which has never been allowed.

Rule refused.

(a) Sitting as single Judge.

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Doe d. ELLERBROCK and Others v. FLYNN.

EJECTMENT for a messuage and premises situate at *Cow Cross, Smithfield*, on the demise, amongst others, of *John Phillips* and *Jane* his wife. At the trial before *Gurney*, B., at the Sittings after last *Michaelmas* Term, the lessors of the plaintiff proved that a Mr. *Cropley*, twenty years ago, had been in possession of the premises, and had built a house upon part of them; that *Cropley* died, and demised the premises to a Mr. *Broad*, upon various trusts; that Mr. *Broad* died about 1830; and that *Jane Phillips* was his heir-at-law. The defendant, in answer to this case, put in a lease, executed by *Broad*, in 1829, to a person of the name of *Townsend*, for five years; and they proved that *Townsend's* occupation under the lease had been recognised by *John Phillips*, the husband of *Jane*, the other lessor of the plaintiff. In reply, the plaintiff called *Townsend*, who proved that *Flynn*, the defendant, had applied to him, stating that the premises were his; that he had told *Flynn* that he was afraid that his landlord would distrain upon him; and that *Flynn* said he would bail him. *Flynn* gave him 5s., and he gave up possession to *Flynn*, who claimed a title adverse to that of the lessors of the plaintiff. *Townsend* proved, on cross-examination, that he had delivered the lease to *Flynn*. The plaintiff also put in an affidavit made by *Flynn*, on an application by him to put off the trial, in which he stated his claim to this and other property under a title hostile to the plaintiff. The plaintiff then contended, that the letting in *Flynn*, claiming an adverse title, was such a betraying of the possession of his landlord by *Townsend*, as amounted to a forfeiture of the lease. The learned Judge reserved the point; and left it to the jury to say, whether *Townsend* had given up the possession to *Flynn* in order that the latter might hold *bonâ fide* under the lease, in which case he di-

A tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up his hostile title, not with the intention that he should hold under the lease:—*Held*, that the term was forfeited.

Exch. of Pleas, directed them to find for the defendant; or whether he had delivered up the possession in fraud of the landlord, to enable *Flynn* to set up a title adverse to that of the landlord, in which case he directed them to find for the plaintiff. The jury gave a verdict for the plaintiff, and they found that the possession was delivered up by *Townsend* to *Flynn* in fraud of the landlord.

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Platt obtained a rule, pursuant to the leave reserved at the trial, against which—

Cresswell and *Crompton* now shewed cause.—The question is, whether, at the time of the demise in the declaration, the lease to *Townsend* was a subsisting lease, or whether it had not been forfeited by his act, in delivering up the possession of the premises to *Flynn*, in fraud of the landlord, for the purpose of enabling *Flynn* to set up a claim adverse to the title of the landlord. The act of *Townsend* was inconsistent with his duty as a tenant. The rule of law on the subject is founded on feudal principles. According to the feudal law, every act tending to the disherison of the lord was accounted a forfeiture. Even the committing of waste, which tended to alter the evidence of the lord's title, was held to occasion a forfeiture. It is laid down in *Wright's Tenures* (a), citing *Glanville* and *Bracton* (b), that estates for life, besides that they are forfeitable by attainder and by *cesser*, are likewise, agreeably to the law of feuds, forfeited by waste, and by all such acts as in the eye of the law tend to devest the reversion or remainder, or in any manner to pluck the seignory out of the lord's hands. So, with regard to copyholds; as, if a copyholder swear in court, that he is not the lord's copyholder (c); or, if he shews the steward a deed pretending thereby that he is a freeholder, and tears to pieces the court roll, these

(a) Page 203, 2nd edit. Litt. 151, 152.

(b) *Glanv.* lib. 9, c. 1, p. 63 b; (c) *The Complete Copyholder*, *Bract.* lib. 2, c. 25, s. 11; *Co.* *Coke's Law Tracts*, p. 132.

are forfeitures (*a*). The same rule is applicable to the *Exch. of Pleas,*
 case of a termor. Thus, if a tenant for years make a feoff-
 ment to gain the freehold, it has been held to be a for-
 feiture of the term. It is a forfeiture, even though he has
 previously assigned the term to a trustee to protect it
 against such forfeiture. *Lord Dormer's Ejectment, H. T.*
1817(b). In a *Quid juris clamat* against a termor, he
 claimed the freehold, and for this cause judgment was
 given that the term was forfeited. *Saunders v. Freeman (c)*.
 In *Bacon's Abridgment (d)*, it is said, that any act of the
 lessee, by which he disaffirms or impugns the title of his
 lessor, occasions a forfeiture of his lease; for to every
 lease the law tacitly annexes a condition, that, if the lessee
 do any thing that may affect the interest of his lessor, the
 lease shall be void, and the lessor may re-enter. Besides,
 every such act necessarily determines the relation of land-
 lord and tenant, since to claim under another, and at the
 same time to controvert his title—to affect to hold under a
 lease, and at the same time to destroy that interest out of
 which that lease arises—would be the most palpable incon-
 sistency. This rule of law is recognised by *Lord Redes-*
dale, in delivering his judgment in *Hoveden v. Lord*
Annesley (e), in which he treats the betraying of the
 possession by a tenant for years as a ground of forfei-
 ture. The usual practice of dispensing with evidence of
 a notice to quit, where there has been a disclaimer, is
 founded on the same principle, *viz.* that the term is
 forfeited, and no longer in existence, and that the party
 disclaiming is no longer tenant. It is said in *Buller's*
Nisi Prius (f), that, if a tenant hold from year to year,
 the landlord cannot maintain an ejectment against him,

(*a*) *The Complete Copyholder, Coke's Law Tracts*, p. 132.

(*b*) Cited in *Preston on Con-*
veyancing, p. 32, 2nd edit.; 3 B.
 & C. 399 n.

(*c*) *Dyer*, 209 *a*.

(*d*) *Lease*, (T.) 2.

(*e*) 2 Sch. & Lef. 625.

(*f*) *Throgmorton v. Whelpdale*,
 B. R. H. 9 Geo. 3, p. 96.

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without giving six months' previous notice unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord, and in that case no notice is necessary. This law has been recognised in various cases. *Doe d. Williams v. Pasquali* (a); *Doe d. Calvert v. Frowd* (b); *Doe d. Grubb v. Grubb* (c). In the present case, although the tenant did not claim the freehold himself, yet he enabled *Flynn*, who was making a claim hostile to that of the landlord, to set up that title. It was distinctly left to the jury to say, whether they were of opinion that *Flynn* came in *bond fide* under *Townsend's* interest as tenant, or whether the possession was delivered up to him by the tenant, to enable him to set up a title hostile to that of the landlord. The jury found the latter; and there was, therefore, such a disclaimer of the landlord's title, by betraying the possession, as to create a forfeiture of the lease. It was urged at the trial, that, unless the lease had been surrendered, it was still subsisting, and that there was no surrender in writing within the Statute of Frauds; but the question is one of forfeiture, and not of surrender, and the provisions of the Statute of Frauds do not apply.

Platt, contrà.—The term was still subsisting, unexpired, and unforfeited, in *Townsend*, on the day of the demise laid in the declaration. No act has been done by him to revest a title to the possession in the landlord, unless it can be made out that the term is forfeited. It may be admitted as a general rule, that, wherever a tenant claims or assumes to himself more than is granted to him by his landlord, in derogation of the title of the latter, that it is a forfeiture. But that was not the case here. *Townsend* had a right to the possession of the remainder of the term of five years, and he had a right to admit any person

- (a) *Peake, N. P. C.* 259. (b) *1 M. & P.* 480; *4 Bingh.* 557.
(c) *10 B. & C.* 816.

during that period to the possession. He did so admit *Flynn*, and by that act the landlord was placed in no worse situation; indeed, he had the additional advantage of a distress upon the goods of *Flynn*. This act could not incur a forfeiture. The law leans against forfeitures, and, in order to create a forfeiture, there must be some clear, precise, and unequivocal act of disclaimer. An intention on the part of a tenant to defraud his landlord is no forfeiture; for, it has been held, that the assignee of a lease may assign the term to a beggar in order to relieve himself from the responsibility (*a*). The *animus* of the tenant in delivering up the possession is therefore immaterial. He has merely done an act which he was entitled by law to do, and his objects and intentions in doing it cannot be inquired into. It would be highly inconvenient if the intentions of parties could be examined in every transaction. Lastly, there was nothing on the part of the lessor of the plaintiff to shew that he intended to insist upon this as a forfeiture. There was no entry or claim made to the possession. [Lord *Lyndhurst*, C. B.—No entry was necessary; the ejectment was sufficient.]

Lord LYNDHURST, C. B.—I think that the jury, upon the facts proved at the trial, came to a right conclusion. If a tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim. Whether he does the act himself, or only colludes with another to do it, it is equally a forfeiture.

The rest of the Court concurred.

Rule discharged.

(*a*) *Taylor v. Shum*, 1 Bos. & Pul. 21.

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*Revenue,
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In the Matter of the Estate and Effects of JOHN WILKINSON, deceased.

Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest among poor pious persons, in ten or fifteen pounds, as they should see fit.

If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to return the duty chargeable on such amount.

THE common rule, (under the 42 Geo. 3, c. 99, s. 2), calling upon executors to account for legacy duties, had been obtained in this case. It appeared upon the affidavits, that, by the last will of *John Wilkinson*, deceased, dated the 20th day of *April*, 1831, he bequeathed as follows:—

“ After all my just debts and funeral expenses are paid, my will and pleasure is as follows:—In case my beloved wife, *Mary Wilkinson*, should survive me, that my executors, hereafter named, do pay my beloved wife, 300*l. per annum*, by even and quarterly payments, during her natural life. Item, I give and bequeath to my son *Jacob Wilkinson*, shopkeeper, at *Southgate, Middlesex*, all the stock in trade; also my freehold estate, No. 8, *Watling-street*, let at 300*l. per annum*, with the rents of my two houses at *Highbury Place, Islington*, Nos. 13 and 20, during the term of the leases, also my silver cup; To my daughter *Jane Smith*, now residing in *Castle-street, St. Martin's Lane*, 2000*l.*, and the house I now live in, 32, *Ebury-street, Pimlico*, formerly 5; also, my silver waiter. Item, to the treasurer for the time being of the Wesleyan Strangers' Friend Society for visiting the Sick and Poor at their own Houses, 100*l.* To the treasurer for the time being of the Dispensary in *Sloane Square*, 100*l.* To the treasurer for the time being of the *Westminster Hospital*, 100*l.* Item, to *John Forrest*, son of *George Forrest* (yeoman), the sum of 19*l. 19s.* Item, to *James Brothers*, the son of *James Brothers* (yeoman), the sum of 19*l. 19s.* As to my wearing apparel, linen, household furniture of every description, my son and daughter may divide or sell, as they please. Finally, after my just debts and legacies are paid, my will and

*pleasure is, that all my money in bankers' hands, bills of exchange, &c. &c., be collected into cash, and laid out in the funds in the Bank of England, where I now have considerable property; and that my executors hereafter named, and their heirs and assigns, do receive the interest thereof at the Bank half-yearly, and divide it among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they see fit, not omitting large and sick families, if of good character.*

By a codicil, dated the 27th *July*, 1833, the testator, after several bequests and legacies, directed that the legacy duty payable in regard to the several legacies and bequests in his will and that codicil mentioned, should be a charge upon and paid out of his personal estate, and did thereby confirm his said will. The executors paid the legacy duties, except upon the fund bequeathed for distribution to poor and pious persons, and they disputed the right of the Crown to legacy duty upon that fund. In *Easter Term*, cause was shewn by—

Stephen, Serjt., Dixon, and Gurney.—The question depends mainly upon the language of the schedule of the 55 Geo. 3, c. 184, which is the last act of Parliament imposing duties on legacies. It is submitted, that, according to the plain meaning of that enactment, the present is not a case in which the legislature intended that the legacy duty should attach. The part of the schedule to which it is necessary to call the attention of the Court is as follows: “For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any

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part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of *August*, 1815; also, for the clear residue (when devolving to one person), and for every share of the clear residue, (when devolving to two or more persons), of the personal or moveable estate of any person who shall have died after the 5th day of *April*, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout,) whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue or share of residue shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of *August*, 1815." Then follow the provisions as to the amount of duty payable on the particular sums specified: Where the legacy or residue is for the benefit of a child, &c., or of the father or mother, 1*l. per cent.*; of a brother or sister, &c., 8*l. per cent.*, &c. &c. &c.; of a stranger, &c., 10*l. per cent.*; and where a legatee shall take two or more distinct legacies or benefits, which shall together be of the amount or value of 20*l.*, such legacies are chargeable, though each separately is under that sum. There are three exceptions—for the benefit of the husband or wife of the deceased, of legacies for the benefit of members of the royal family, and of certain specific legacies in certain cases given to certain public bodies. It is clear from all these provisions, that the legislature intended to impose the duty only in the case of legatees who take beneficially under a will. If that were not so, the exemptions and the variations in the scale of duties, according to the particular relationship, would be perfectly absurd and unmeaning. The duty then attaches upon beneficial interests only; and it attaches upon persons taking individually, so that the scale of duties may be applied to their beneficial interests. It

is true, that the part of the schedule which has been referred to may at first sight seem to impose the duty generally upon the legacies; but the subsequent clauses limit the operation of the earlier part, and shew that there are no cases within either the words of the act, or the contemplation of the legislature, except cases of which it may be predicated that a legacy or residue is to be taken for the benefit of some particular individual, and that such particular individual stands in a particular degree of relationship, or is not related to the testator or intestate.

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Now, the present case is one of a legacy, given in such a manner as that no person taking beneficially and individually can take more than 15*l.*; as, therefore, the provision of the act is, that the duty shall attach upon every legacy of the amount or value of 20*l.* or upwards, the present cases, being legacies to the amount of 15*l.* at the most, are wholly out of the operation of the schedule. It is material to remark that this limitation of the amount of 20*l.* does not come by way of exemption; but the enacting part of the act which imposes the duty is limited by the description that the legacy shall amount to 20*l.* or upwards. If it had been by way of exemption, it might have been argued, that the party claiming the benefit of the exemption is bound to bring himself within it; as it is, it must clearly lie upon those, who say that a legacy is chargeable with this duty, to shew that it is of the amount of 20*l.* If then the proposition be correct, that it is an individual, and the individual taking the beneficial interest—who is to pay the legacy duty; who is the person who is to pay it in the present case? Can any person be chargeable with it except the poor person to whom the trustees, in the exercise of their discretion, may think fit to allot the bounty of the testator? Unless the duty attaches upon them individually, the scale or rate of duty cannot be applied. Suppose a remote descendant of a

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brother of the testator should at any time be fixed upon as an object of the bounty of the testator, such person would clearly be chargeable only with a duty of *3l. per cent.* The only way in which this argument can be met, is by assuming that the poor persons are to be considered as a class; and, if they are to be taxed as a class, the gross sum left to the trustees for their use would be taxed *10l. per cent.*, amounting in this case on the whole fund to the sum of *3000l.* It is, however, difficult to see how they can be taxed as a class without violating the provisions of the act; for the legacy duty cannot be charged upon a class without a total disregard of the distinction which the legislature intended to establish, according to the degree of relationship in which the legatee stood to the testator. It is a fallacy, however, to say, that the persons taking beneficially are to be taxed, but that they are to be taxed as a class. If they are to be taxed as a class, the fund is taxed, and not the individuals. The individuals are, in that case, taxed neither collectively nor individually; *10l. per cent.* would be taken from the fund, and the trustees would have so much the less to distribute, but the individuals might receive exactly the same. The question, then, comes to this, whether, under the act, there is any authority to tax the legacy itself, without adverting to the character of the person who is to take the benefit of the gift, as to his degree of relationship to the deceased? [Alderson, B.—Who would take the beneficial interest in the gift to the *Westminster Hospital*?] It has been generally supposed that legacy duty is chargeable on a bequest to a public institution; but, supposing that to be so, it is a very different case from the present. A bequest to the *Westminster Hospital*, to *Lincoln's Inn Library*, or to the *British Museum*, or any other public body, is a bequest for the benefit of the body, the party to take the beneficial interest. If there be a person to take an ulterior benefit, as in the present case, it is upon such person that the tax must fall; but, in the case of a public body, the body is

the party beneficially taking. It is true, that, in the case put of an hospital, it may be said, that a person who breaks his leg may indirectly receive a benefit from the legacy, but it would be fantastical to call him a legatee. With regard to corporate bodies, they are liable in the strictest sense; and, in the case of public bodies, not corporate, it may, with propriety, be said, that the bequest is for the benefit of the body. But it is quite clear, that where there is an ulterior person to take the benefit of the legacy, he, and not the person distributing the fund, is the person to be charged. That must be so, or else the great absurdity would follow, that, if the trustees were in a near degree of relationship, a less amount of duty, or no duty at all, would be payable. It happens, in this case, that one of the trustees is a son. Suppose all were sons, then, if the duty is chargeable upon the trustees, it would follow that 1*l. per cent.* only would be payable, though the parties to take the ulterior benefit were in no degree of relationship to the testator; and the act evidently intends that persons in such situations, if the legacy be to the amount of 20*l.*, shall pay 10*l. per cent.* The absurdity would be still greater in the case of a wife being appointed trustee, in which case no duty would be chargeable upon her.

If it is said that these poor persons are not to be considered as taking a beneficial interest as legatees under the will, it will follow that there are no persons who take a beneficial interest, and the same result will ensue, because it is on a beneficial interest only that the legacy duty is chargeable. If a case can occur, where no person takes a beneficial interest, it is a case not within the provisions of the act. It may have been the intention of the legislature not to include cases where there is no person who is beneficially and individually interested. In such a case the legacy is to the public, and as the tax is for the benefit of the public, it is impossible to say that the legislature may not have intended to exempt a case where the

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public have the benefit in some shape or other of the whole of the legacy. It might have been the intention of the legislature to encourage such bequests. It will probably be said, on the other side, that we have no right to assume that the *maximum* to be given is 15*l.*; because it may happen that the trustees may give 15*l.* to a particular person, and may give the same sum to the same person in a succeeding year, or succeeding years. There is nothing, however, in this objection. It is for the crown to shew affirmatively that this is a case of a legacy amounting to more than 20*l.* That is not made out by a supposition, that a case may happen, at a future time, where the legacy might amount to 20*l.* There is considerable doubt, whether, under this will, the trustees could make the same person the object of the bounty in two successive years; but, supposing that they could, the only consequence would be, that in that particular case the legacy duty would attach. In reference to this objection, or any other which may be made as to the difficulty of the application of the principle contended for on behalf of these executors, it is material to advert to a clause in the 36 Geo. 3, c. 52, which is still in force as to all the regulations contained therein. That act anxiously provides for all possible cases, and states what shall be deemed legacies within the act. By section 7, it is provided, that any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity, or in any other form." The act then proceeds to direct how the value of annuities shall be calculated, and the manner in which the duty

thereon shall be charged. After thus providing for these different cases, the legislature by the eleventh section enacts, "That if any benefit shall be given by any will or testamentary instrument in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith, or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then, and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same." It would seem, from the provisions of the above section, that the legislature had actually foreseen the very species of case which now arises. It would not be easy to frame a clause more closely adapted to meet the difficulties of the particular case now before the Court. Here, the amount or value of the bequest can only be ascertained from time to time by the actual application of the fund. It is also a case in which, by reason of the form and manner of the gift, it is difficult to ascertain the amount, or charge the duty.

The case of *Ex parte Franklin*(a) is the only case in which a point of this nature has ever been decided. That was a decision of the Vice-Chancellor's upon petition coming before him in an incidental way upon a question which arose on the administration of a testator's estate. There, the testator, by his will, gave and bequeathed to the poor of the parish of *Haddenham*, in the

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county of *Bucks*, 50*l.* *per annum* for ever, to be laid out at *Christmas* in bread, and distributed by the minister and churchwardens to the most needy objects in the parish. The testator charged his leasehold and personal property with this amongst other legacies. The poor of the parish of *Haddenham* consisted of eight hundred and twenty persons, and no one person in the course of one year could receive more than the value of 2*s.* in bread on account of the charity. It seems to have been argued, that, as no one could take more than 2*s.*, it must go to them as a class. The Vice-Chancellor decided, that it was a legacy on which the duty ought to be paid. He said, that though not expressed to be given to any individual, it was in effect given to the executors in such a manner as that they held it in trust for certain purposes; he said further, that the mode in which it was given did not admit of its being ascertained what sum or what precise benefit any one individual would have in the legacy. He says afterwards, that it was in effect a gift for charitable purposes; and observed, that the legislature seemed to have supposed that, in cases where the degree of relationship could be ascertained, there should be a progressive charge; but that in the case before him the legacy was so given that kindred seemed to be out of the question, and that there was a complete sum of 50*l.* for charitable purposes. In other words, he decided that the duty was chargeable on the fund, not on the individuals, which, it is submitted, could not, for the reasons before offered, be the intention of the legislature. The Vice-Chancellor observes, "with respect to legacies given to charities, there has been, by the general assent of mankind, a construction put upon the statutes, so as to charge such bequests with legacy duty. Where legacies have been given to treasurers of hospitals and other charitable institutions, it has been considered as a matter of course to pay the duty." That may be the case with respect to a charitable institution, especially if it be a body corporate.

In such case there is no difficulty; for the hospital, as an hospital, is the beneficial legatee. Such a case is not analogous to the present, for there, there are persons who have already combined for a particular purpose, and it may fairly be presumed as against them, that, having combined for that object, they had some interest in its attainment, and, therefore, that a legacy to them is a legacy for their benefit. [Alderson, B.—Is there any decision where it has been held that it is necessary to pay legacy duty on a bequest to an hospital?] No. The Vice-Chancellor in *Ex parte Franklin* assumes it; and says, that it is by the general assent of mankind. [Parke, B.—I have no doubt that it is usually paid. Alderson, B.—The practice certainly is to pay it.] In *Ex parte Franklin*, the parish might well be considered as a body taking beneficially, as they would be benefited by the relief of their poor, whom they were legally bound to maintain.

The present case is one where there are clearly persons who take ulterior benefits; and the attempt on the part of the crown is to charge the legacy duty upon the trustees, who take no beneficial interest; in other words, to charge it upon the fund; and it is submitted that there is nothing in the act of Parliament to sanction such a mode of charging this duty. It is quite sufficient for the purpose of invalidating the authority of *Ex parte Franklin*, that the very important clause which has been cited from the 36 Geo. 3, was not referred to, either by the bench or at the bar in that case.

As to the argument that it would be impossible or highly inconvenient to levy the particular duty on each particular legatee who should receive at any time more than 20*l.*, it should be remembered that any such inconvenience is guarded against by the 27th, 28th, and 29th sections of the 36 Geo. 3, c. 52, by which no legacy is to be paid without a receipt being duly stamped; and such receipt is not to be stamped until the duty is paid. Whenever the bounty of a testator in such a case should be repeat-

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ed in favour of any particular person, the Stamp-office must necessarily have information, and the duty would be easily collected.

The Attorney-General, *Amos*, and Sir *George Grey*, for the Crown:—The 6th section of 36 *Geo. 3*, c. 52, which is the statute under which this duty is collected, though the amount has been raised by more recent statutes, provides, “That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will, or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, or her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons.” Whenever, therefore, the executor retains for the benefit of any other person or persons, the executor is to pay the legacy duty. This obviates all difficulty as to the poor persons in question paying the legacy duty and giving a stamped receipt. It surely never could have been the intention of the legislature, that, under such a bequest, the duty should be chargeable on the poor persons, and that they should give the receipt. Looking at the words of the statute 55 *Geo. 3*, it is clear, that, either as legacy or residue, this sum of 3000*l.* must be retained by the executors for the benefit of those amongst whom it is ultimately to be divided. That act imposes the duty upon “every legacy, specific or pecuniary, &c. of the amount, &c. of 20*l.* given by any will, &c. of any person who shall have died after the 5th *April*, 1805, either out of personal estate, &c. &c., and which shall be

paid, delivered, retained, satisfied, or discharged after the 31st day of *August, 1815.*" The duty, therefore, is to be paid upon every pecuniary legacy which is retained after the 31st *August, 1815.* It proceeds to impose the duty also upon "the clear residue (when devolving to one person), and every share of the clear residue (when devolving to two or more persons) of the personal estate, &c. of any person who shall have died after the 5th *April, 1805,* (after deducting, &c.), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue, or share of residue, shall be of the amount of *20l.* or upwards, and where the same shall be *paid, delivered, retained, satisfied, or discharged* after the 31st day of *August, 1815.*" Therefore, where the residue is of the value of *20l.*, and is retained by the executor after the 31st day of *August, 1815,* the legacy duty is to be paid. It has been said, that it lies upon the crown to shew that this residue exceeds *20l.*; but it is admitted that it amounts to about *30,000l.*, which has been retained by the executors. There is another act of Parliament, which it is important to advert to. The 39 Geo. 3, c. 73, was an act for exempting from the payment of legacy duties *certain specific legacies* given to bodies corporate, and other public bodies and societies. The act enumerates books, prints, gems, &c. &c. Without the provisions of this statute any specific articles left to any of these bodies would have been chargeable with legacy duty as articles not within that statute, and pecuniary legacies still are. It is only by the provisions of this statute, that books, for instance, left to any charitable institution, are not chargeable with legacy duty, although no beneficial interest is taken by any individual. Under this very will, these executors have, on this principle, paid legacy duty on the bequest to the treasurer for the time being of the Wesleyan Strangers' Friend Society for visiting the Sick and Poor

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at their own houses. The principle contended for on behalf of the crown is this; that the entire sum bequeathed to the charitable objects must be considered as the legacy, and not the smaller parts into which it is to be divided for the purposes of distribution. It is upon this principle, that these executors have paid the duty upon several of the other legacies in this will. The argument on the other side seems to resolve itself into this proposition, that where there is a legacy to a person who does not take a beneficial interest, it is *casus omissus*, and the duty does not attach. That at least is the main strength of their argument; and it should be observed, that it would attach with equal force to the case of the legacy to the Wesleyan Strangers' Friend Society, and to all the other cases of legacies to charitable institutions, in which it seems hardly to have been contended that the duty is not payable. In the case of the legacy to the Wesleyan Strangers' Friend Society, the treasurer takes no beneficial interest, and there is no other person who could sue as legatee. If, in the present case, there had been a bequest to *A.* and to *B.*, *nominatio*, of respective sums under 20*l.*, they would have been legatees, and they would have been the persons who might have called upon the executors to pay the legacies; but, in the present case, every thing is left to the discretion of the executors, and there is no other person who can call himself a legatee; a person who receives the bounty does not take it under the will, but by the gift of the executors. The bequest in question cannot be distinguished in principle from the prior bequests for charitable purposes in this same will. The amount of the residue being uncertain makes no difference; and it may be considered as if it were a legacy of 1000*l.* to the executors, to be divided "amongst poor and pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they see fit, not omitting large and sick families, if of good character." Now, such a bequest would give no interest whatsoever under this will to any person except the

executors; they would take the 100*l.*, to be distributed exactly as they should see fit. Suppose that there had been no limitation in this will as to the 10*l.* or 15*l.*, or suppose that the money had been directed to be distributed in sums of 50*l.*, the persons who received such sums of 50*l.*, by virtue of the gift of the executors, would not be legatees under the will; nor would they be the persons to pay the duty. The duty in such case must be paid by the executors; and the persons receiving the bounty would receive the clear net sum of 50*l.*, without being subject to any deduction for the legacy duty, for those persons would not take as legatees under the will, but by the gift of the executors. It is submitted, that the poor and pious persons would not, in the case put, be liable to pay any legacy duty; and, if they would not be liable to legacy duty, if the sum were of the amount of more than 20*l.*, it is clear, that, in the case where they take less than 20*l.*, they cannot be considered as legatees. They are in no case to pay the duty, which must, therefore, be paid by the person who retains it, and who, although he cannot put it into his own pocket, has the beneficial interest of distributing it as he pleases; he has, at least, this power and patronage. The executors then, in this case, are to be considered as the legatees. [Parke, B.—If you treat the executors as legatees, what rate of duty are they to pay? One of them is a son of the deceased.] But he retains it for the use of strangers. [Parke, B.—That is to say, that it is not a legacy to the executors, but to the poor as a class.] There will be no difficulty, if it is construed as a legacy to the poor as a class, for then it would be a retainer by the executors for the poor, as a class. [Alderson, B.—Would there not still be the difficulty, that some of the class might be relations of the testator?] That might raise a question on the amount of the duty in each particular case. [Parke, B.—You would interpret the act of Parliament as if, instead of the last description of legacy

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mentioned in the act being "in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased," it were to "any other person or persons whomsoever;" as if it meant to say, to any other person or persons than those before alluded to.] Exactly so, and that seems to have been so considered in *Ex parte Franklin*; for it was there decided, that it was not necessary to wait to see whether the person was to be a relation or not, but that the legacy duty was payable immediately. That case was not decided on the ground of any benefit accruing to the parish. The poor in that case alone received the bounty. Nor was it the case of a corporation; but it was treated by the Vice-Chancellor as a case analogous to that of a bequest to an hospital, in which case the constant usage alluded to by that learned person, strongly supports the view of the case which he took upon that occasion. It would be highly inconvenient to wait an indefinite time to ascertain whether the quantity of physic taken made the benefit amount to 20*l.*, or whether the number of the poor was such, as that the share of a particular person amounted to that sum; or whether, as in the present case, the selection of the same person on two occasions caused the whole sum received by him to amount to 20*l.* This seems contrary to the intention of the statute, which imposes the duty, not merely on the payment, but on the retainer for the purpose of subsequently disposing of the legacy. It is much more reasonable to treat this as a general legacy for charitable purposes; and, if so, the language of the Vice-Chancellor applies, who says, in the case before cited, that where a gift is in fact a gift for charitable purposes, there has been, by the general assent of mankind (which must be supposed to have carried with it his own opinion at that time), a construction put upon the statutes, that such a bequest is liable to legacy duty.

The words of this will constitute a legacy of the residue, upon the whole *corpus* of which the duty would attach; and the legacy is not to be considered as divisible, or divided into as many separate portions or shares as there may be individuals selected by these executors to take under the will. It is clear from the 36 Geo. 3, c. 52, s. 6, that there is a difference between the payment by executors of a legacy to a legatee, and the retainer by executors of legacies for the use of other persons. Taking that section in conjunction with the 27th section, which relates to the receipts to be taken by executors on the payment of legacies, it is equally clear that this is not a case in which the legislature could have intended the receipts mentioned in that section to be taken by the executors, and the legacy must, therefore, be taken as one undivided legacy to the executors, subject to certain directions as to the mode of appropriation; and it cannot be deemed a legacy to be paid by the executors to any other individual marked out by the will. The 27th section prohibits any executors, trustees, &c. from paying &c. &c. any legacy, &c., or residue, &c., without taking a receipt or discharge in writing for the same. [Parke, B.—You say that it is not to be considered as a legacy to the individuals who receive the money, but that they take as by the gift of the executors. There is still a question whether this is a legacy within the act of Parliament; whether a legacy to a class of this description falls within the last description of legacies "to persons in other degrees of consanguinity, or to strangers in blood." If the words of the act, as I mentioned before, were "a legacy to any other person or persons whomsoever," a legacy to such a class would certainly fall within its provisions.] There is no authority whatsoever to shew that such a legacy is not within the act, and the case of *Ex parte Franklin* is a strong authority expressly in point in favour of a legacy of this description being subject to duty.

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PARKE, B.—We will consider this case; it is of some importance.

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Cur. adv. vult.

The judgment of the Court was now delivered by PARKE, B.:—The question which arises in this case is, whether the executors are liable to pay the duty on this legacy, and to what amount? By the 36 Geo. 3, c. 52, s. 6, the duties imposed by that statute are to be accounted for, answered, and paid by the persons taking upon themselves the execution of the will, upon retainer for their own benefit, or the benefit of any other person or persons, of any legacy, or the residue of any personal estate, or any part of such residue; and also upon delivery, payment, or other satisfaction of any legacy, &c.; and by the 55 Geo. 3, c. 184, sched. part 3, the duties therein mentioned are imposed upon every legacy or share of residue, paid, delivered, retained, satisfied, or discharged. But it is obvious that the executors are to be accountable for no duties except those which are specifically imposed by the act of Parliament; and the question is, whether any and what duty is imposed upon such a legacy as this? In order to determine this question, it is necessary to take a short review of the different acts of Parliament upon this subject.

The first statute imposing duties on legacy receipts was the 20 Geo. 3, c. 28, which enacted that a duty should be paid upon every receipt for any legacy, or part of a personal estate, divided by force of the Statute of Distributions, or the custom of any province or place. The 23 Geo. 3, c. 58, and 29 Geo. 3, c. 51, increased the amount of these duties, adopting similar language. The 36 Geo. 3, c. 52, enacted, that these duties should cease, and repealed so much of the before-mentioned statutes as related to them, and proceeded to impose fresh duties, upon the same principle, and in nearly similar terms, except as to amount,

as are contained in the 3rd schedule to the act 55 Geo. 3, c. 184, the statute now in force. The 7th section provides, "That any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity, or in any other form." Then follows, after others, this important clause—section 11, "If any benefit shall be given by any will or testamentary instrument in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith, or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then, and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same." The statute 39 Geo. 3, c. 73, exempts certain specific legacies, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the society of *Serjeants' Inn*, or any of the inns of court or *Chancery*, or any endowed school, in order to be kept and preserved by such body corporate, society or school, and not for the purpose of sale; it also excepts a certain legacy to the trustees of the

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British Museum. The statute now in force is the 55 Geo. 3, c. 184; and schedule 3, part 2, provides that, for legacy, residue, or share of residue, of the amount or value of 20*l.* and upwards, where any such legacy, residue, or share of residue, shall have been given to or for the benefit of a child, a duty shall be paid of 1*l. per cent.*; an increased duty for more distant relatives; "and where any legacy, &c. shall have been given to or for the benefit of any person in any other degree of collateral consanguinity than above described, or to or for the benefit of any stranger in blood," then a duty after the rate of 10*l. per cent.* And the schedule provides, that all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, shall be deemed legacies within the intent of this act; and there is an exception of legacies which were exempted from duty by the 39 Geo. 3, c. 73. Considering the provisions of these statutes together, it seems clear, in the first place, that the legislature intended to subject all legacies above 20*l.* in value, to a duty, whether given to individuals, or to bodies corporate, or societies; for the statutes prior to the 36 Geo. 3, in terms comprise all legacies; and though that statute, after enumerating those to persons in different degrees of consanguinity, mentions only legacies which shall be given, or shall pass to or for the benefit of any person in any other degree of collateral consanguinity, or any stranger in blood, and not all other legacies, yet taken in conjunction with the 39 Geo. 3, it clearly means to comprise not merely legacies to individuals, but to bodies corporate and societies. In the second place, it appears to be equally clear, that the persons, bodies corporate, or societies, who take the beneficial interest in the legacy, that is, those who actually receive the benefit, are ultimately to pay the duty. And in the third place, that any benefit given by will, which shall by virtue of the will be satisfied out of the personal estate, is a legacy within

the meaning of this act. Now, in this case, who are the persons who take the beneficial interest in this legacy of the residue? They must be, either, first, the executors themselves; or, secondly, the individuals selected by them; or, thirdly, the whole body of poor and pious persons out of whom the selection is to be made. The gift must enure to the benefit of one of the three descriptions of persons, for no others can be suggested; and there can be no case of a legacy under a will which is not beneficial to some persons. First, the executors have no beneficial interest in the legacy; their duty is simply to divide the annual interest among such poor and pious persons as they think fit, in sums of 10*l.* and 15*l.* each. They can make no other appropriation or disposition of the money. It appears to us, therefore, that they cannot be charged as beneficial legatees. It remains, therefore, to consider, whether the individuals actually benefited, or the whole body of persons that may be benefited, are the beneficial legatees. It appears to us, that all poor and pious persons whatsoever cannot be considered as a society, or body of persons, or class, taking the benefit of this legacy. The whole body has no power or control over the fund, nor has any trustee or agent for them such power or control, nor has any individual falling under the description of poor and pious any right whatever to any portion of it. All he has is the chance of being nominated as a fit person to receive part of the money. We cannot think that these persons are a body, taking as such the beneficial interest in the legacy; and we must therefore hold, that the individuals selected are the persons who take a benefit under the will, and are consequently liable to the duty, in those cases in which duty attaches; and the clause of the 36 Geo. 3, c. 52, s. 11, above referred to, seems to us to be exactly applicable to this case. The result is, that such individuals will be liable to the duty where the sum received by each exceeds

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20*l.*; and then, and not until then, the executors will be accountable, and bound to retain the duty according to the rate applicable to such person who receives the testator's bounty. By our present decision, we do not mean to question the legality of the practice of imposing the highest rate of duty on bequests to corporations or societies established for charitable purposes, or to individuals in trust for such societies. Legacies of this description are contained in this will, and they are cases in which the entire control and power over the legacy is vested in the corporations or societies therein named, or in those who have the governing authority over them. In such cases the corporation or society may not improperly be considered as taking the entire beneficial interest. The case of *Ex parte Franklin*(*a*), the authority of which has been pressed upon us, is more difficult to distinguish from the present, and I am not sure that it can be satisfactorily distinguished. That was a legacy to the executors in trust for the poor of a particular parish; and it may possibly be contended that the poor of one parish is in the nature of a corporation or society of persons, and that they took the legacy in that character. It is, however, in our opinion doubtful whether such a bequest can be properly compared to a legacy to a charitable institution; and the difficulty which occurred to the Vice-Chancellor in the way of considering this as a legacy to individuals, namely, that it was impossible to ascertain at the time of the gift what precise benefit any individual would have in that legacy, is certainly removed by reference to the clause in 36 Geo. 3, which clearly shews that bequests, on which it was impossible to ascertain what benefit was taken until the money was applied, are yet legacies to individuals, and liable as such to duty under the act. The result is, in our opinion, formed not without some difficulty

(*a*) 3 Y. & J. 544.

and doubt that the rule must be discharged; and that the executors cannot be called upon to pay the duty on the whole of the residue.

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DEBT, for an escape, against the defendant as serjeant at mace for the borough of *Liverpool*.—The declaration stated, that whereas, at the Court of record of our lord the king of the borough of *Liverpool*, holden at *Liverpool*, in the county of *Lancaster*, in the common hall of the same borough, and within the jurisdiction of the same Court, that is to say, on the 14th day of *February*, 1833, before *Charles Horsfall*, Esq., the then mayor, and *Robert Gladstone* and *James Aspinall*, the then bailiffs of the said borough, and judges of the same Court, according to the custom of the same borough from time immemorial there used and approved of, came the plaintiffs, by &c., and there at the same Court levied their certain plaint against one *Thomas Jones*, in a certain plea of trespass on the case on promises, to the damage of the plaintiffs of 30*l.*, for a certain cause of action arising to the plaintiffs within the jurisdiction aforesaid, to wit, for the non-performance of certain promises and undertakings then lately within the jurisdiction aforesaid made by the said *Thomas Jones* to the now plaintiffs, (the same being then and there matter and cause of action within the jurisdiction and cognizance of the same Court), and such proceedings were thereupon had in

By the practice of a Borough Court, writs of *ca. sa.* were directed to *A. B.*, serjeant at mace of the said borough, and also to *C. D.* and *E. F.*, (naming one or more), persons who were appointed by the serjeant to execute the process of the Court, and who give an indemnity to him. No warrant is ever made out on those writs.

The serjeant dismisses the officer at his pleasure, and takes the fees for the execution of process. If it is wished that process should be executed by any body, not being one of the persons so appointed, it is done by the consent of the serjeant

on application to him, and in such case a special indemnity against the acts of such person is given to the serjeant. The serjeant is always ruled to return these writs, and he is served personally with the rule; he does not return them himself, but the officers return them in their own names. The attachment for not returning, &c. issues against the serjeant, and bail-bonds are always taken to him in his name:—

Held, that the officers were the officers of the serjeant at mace, and that he was responsible for their default in the execution of process.

Exch. of Pleas, the same Court, that, afterwards, to wit, at the said Court
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of our said lord the king of the borough of *Liverpool*
aforesaid, holden at *Liverpool* in the county aforesaid, in
the common hall of the said borough, and within the juris-
diction of the said Court, that is to say, on the 11th
day of *July*, in the year of our Lord 1833, before the
said &c., the plaintiffs, by the consideration and judgment
of the same Court, according to the custom of the said
Court and borough therein from time immemorial used
and approved of, recovered against the said *Thomas*
Jones 45*l.* 3*s.* 4*d.*, which, in and by the said Court holden
as last aforesaid, were adjudged to the plaintiffs for the
damages which they had sustained, as well by reason of
the not performing certain promises and undertakings be-
fore then made by the said *Thomas Jones* to the plaintiffs
within the jurisdiction aforesaid, to wit, the promises and
undertakings first aforesaid, as for their costs and charges
by them about their suit in that behalf expended, whereof
the said *Thomas Jones* was convicted, as by the record
and proceedings remaining in the said Court of *Liverpool*
aforesaid, in the county aforesaid, and within the jurisdic-
tion aforesaid, more fully appears; and which said judg-
ment, at the time of the issuing of the precept, the arrest
and escape hereinafter respectively mentioned, remained
in full force and effect, and not reversed, satisfied, or
otherwise vacated; and the said plaintiffs further say, that
afterwards, to wit, on the 22nd day of *August*, in the year
of our Lord 1833, to wit, at *Liverpool* aforesaid, in the
county aforesaid, and within the jurisdiction aforesaid, for
the recovery of the said sum of 45*l.* 3*s.* 4*d.*, the plaintiffs
sued and prosecuted out of the said Court then holden at
Liverpool aforesaid, in the county aforesaid, and within
the jurisdiction of the said Court, before the said mayor
&c. of the said borough, and Judges of the Court, accord-
ing to the custom of the said Court and borough there
from time immemorial used and approved of, a certain

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precept, commonly called a *capias ad satisfaciendum*, against the said *Thomas Jones*, by which said precept it was commanded to the defendant, then being serjeant at mace of the said borough, and also to one *Alexander Lord*, which said *Alexander Lord*, then and from thence, until, and at the time of the arrest and escape hereinafter mentioned, was the officer and bailiff of the said defendant, to wit, at &c., that they or one of them should take the said *Thomas Jones*, if he should be found within the said borough, and him safely keep, so that they or one of them should have his body before the mayor and bailiffs at the then next Court of the said borough, to satisfy the plaintiffs the said sum of 45*l.* 3*s.* 4*d.* so recovered as aforesaid, and that they or one of them should have then and there that precept; and at the foot of the said precept was then and there written a memorandum, whereby the said defendant and the said *Alexander Lord* were directed to take the said sum of 45*l.* 3*s.* 4*d.*, which said precept, with the memorandum, afterwards and before the return thereof, to wit, on the 22nd day of *August*, 1833, at *Liverpool* aforesaid, and within the jurisdiction aforesaid, was delivered to the defendant, who, at the time of the suing forth the said precept as aforesaid, and from thenceforth until, and at and after the escape of the said *Thomas Jones* hereinafter mentioned, was serjeant at mace of the said borough, and as such serjeant at mace, during all the time last aforesaid, according to the custom of the said court and borough there from time immemorial used and approved of, had and ought to have had the execution of the said precept, to be executed in due form of law; by virtue of which said precept, the defendant, so being serjeant at mace of the said borough as aforesaid, afterwards, and before the return of the said precept, to wit, on the day and year last aforesaid, and within the jurisdiction aforesaid, to wit, at &c., took and arrested the said *Thomas Jones* by his body, and then and there, by virtue of

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Exch. of Pleas, the said precept, had and detained him in his custody in
 1834. execution for the said sum of money so mentioned in the
Morris said precept as aforesaid, and kept and detained him in his
v. custody in execution for the said sum of money so men-
PARKINSON. tioned in the said precept as aforesaid, within the jurisdiction
 aforesaid, from thence until the defendant, so being ser-
 jeant at mace as aforesaid, afterwards, to wit, on the day
 and year last aforesaid, within the jurisdiction aforesaid at
Liverpool aforesaid in the county aforesaid, without the
 leave or license and against the will of the said plaintiffs,
 suffered and permitted the said *Thomas Jones* to escape
 and go at large, and the said *Thomas Jones* did then and
 there escape and go at large wheresoever he would, out of
 the custody of the defendant, he the defendant so being
 serjeant at mace as aforesaid, and the said sum of money
 so mentioned in the said memorandum as aforesaid being
 then and still wholly unpaid and unsatisfied to the plain-
 tiffs, to wit, in the county aforesaid, whereby an action
 hath accrued, &c. Plea—the general issue.

At the trial before *Alderson*, B., at the last *Spring assizes* for the county of *Lancaster*, a question arose whether the defendant was responsible for the negligence of *Lord* the officer, who had arrested one *Jones* under a *ca. sa.*, in an action of *Morris v. Jones*, in the Borough Court of *Liverpool*. The process of *ca. sa.* was as follows:—

Borough of *Liverpool*, } It is commanded to *Timothy*
 to wit. } *Parkinson*, serjeant at mace of
 the said borough, and also to *Alexander Lord*, that they,
 or one of them, take *Thomas Jones*, if he shall be found
 within the said borough, and him safely keep, so that they,
 or one of them, have his body before the mayor and bail-
 iffs, at the next court of the said borough, to satisfy *James*
Morris and *Joseph Morris* 45*l.* 3*s.* 4*d.*, which they lately
 recovered against the said *Thomas*, for the damages which

were sustained as well by reason of the non-performance of certain promises and undertakings lately made by him to the said *James* and *Joseph*, at the borough aforesaid, as for the costs and charges about their suit in that behalf expended, whereof the said *Thomas* is convicted in the said Court, as by the record thereof it doth appear; and that they, or one of them, have then and there this precept. Dated the 8th day of *August*, in the year of our Lord 1833.

By the Court, 14th *August*, 1833.

Cross, attorney for the plaintiff.

	£	s.	d.
Damages	25	8	0
Debt	19	15	4
Take . . .	£45	3	4

It was proved, that *Lord*, the officer named in the *ca.* *ca.*, and several other officers, were appointed by the defendant to execute the process of the Borough Court. It had always been the practice to issue the process, as in the present case, to *A. B.*, the serjeant at mace, and *C. D.*, *E. F.*, &c., naming one or more of the officers appointed by the serjeant, commanding them that they or one of them should take &c. &c. No warrants are ever made out by the serjeant on these writs. The officers give indemnity to the serjeant on their appointment; and *Lord*, the officer in question in this case, was proved to have given a bond of indemnity to the defendant. The officers are usually called officers of the serjeant at mace; they are dismissed by the serjeant. The serjeant takes the fees for the execution of the process. If process is directed to a person not being one of these officers, it is done by an application to the serjeant, and upon giving him a special indemnity. The practice is, that the serjeant is always ruled to return the writs, and the rules to return are served personally upon him. The serjeant does not personally return them,

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but the return is made by the officer in his own name. If the writs are not duly returned, the attachment issues against the serjeant at mace. Bail-bonds on these writs are always taken in the name of the serjeant at mace.

The learned Judge nonsuited the plaintiff, giving him leave to move to enter a verdict.

Cresswell accordingly obtained a rule for that purpose, against which cause was now shewn by—

F. Pollock and Wightman.—The practice of this Borough Court is singular; but it seems only to amount to this, that the appointment of these officers is a piece of patronage in the disposition of the serjeant at mace. When he, however, has appointed them, they become the officers of the Court, who recognise them, and direct their process to them in their individual names, and not as the officers of the serjeant at mace. The declaration is not proved; it avers that the writ was delivered to the serjeant, and it was, in point of fact, delivered to the officer. [*Alderson*, B.—That comes to the same question, whether they were the officers of the serjeant or not; if they were, the delivery to them is a delivery to the serjeant.] In *Foster v. Blakelock* (a), a distinction was taken by *Bayley*, J., between the general bailiff of the sheriff, and a special bailiff, who is selected by the party. Suppose, here, that, instead of the party naming the officer in the writ, and getting the Court to issue the writ to him, the writ had been directed and delivered to the serjeant, he might then have caused it to be executed by any one of his officers, whom he thought most qualified for that particular duty. From the evidence, it appears that it is not even necessary that the writs should be directed to the officers who have been appointed by the serjeant. Some-

(a) 5 B. & C. 331; 8 Dowl. & Ryl. 48.

times, though rarely, they have been directed to other persons not so appointed. The Court seems, by directing the process to these officers by name, and, by receiving the returns in their names, to recognise them as the officers of the Court. They are named indeed by the serjeant, but the Court adopt them as the officers of the Court, and, by the writ not going through the serjeant's hands, he is deprived of the opportunity of selecting a proper person for the execution of the particular writ. It is submitted, that these persons to whom the Court direct their process, and who are allowed to return the process in their own names, become the direct and immediate officers of the Court, and, if that be so, they are not the officers of the serjeant at mace, and he is not responsible for their default.

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Cresswell and *Addison*, in support of the rule.—The argument on the other side proceeds entirely on the assumption that these persons are the officers of the Court, and not of the serjeant at mace, which is the whole question in the cause. It is submitted, that the only reason for introducing the name of the officer is to avoid the expense and trouble of issuing a warrant in every case. Otherwise, if the practice be not to issue a warrant, the serjeant must execute every writ in person. Suppose the writ, after naming the serjeant and the persons to execute it, contained the words "his officers," could there be any doubt; and, if so, why is not the plaintiff at liberty to shew by evidence that those persons were in point of fact the officers of the serjeant? It is clear on the evidence, that the serjeant had the return and execution of these writs. His taking the fees, the rules to return and the attachments being issued against him, and bail-bonds being taken in his name, all shew that he was the person having the execution and return of the writs of this Borough Court. [Lord *Lyndhurst*, C. B.—They seem to be directed to the serjeant as the principal, and to the others as his bailiffs.] It has been supposed, that the return being made in the

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name of the officer makes a difference. That is not, however, a correct proposition. It is laid down in *Comyns's Digest* (a), that a deputy regularly ought to act in his office in the name of his principal: but that an act by a deputy in his own name will be good, except in a special case. [Lord Lyndhurst, C. B.—It was proved, that it was the duty of the serjeant to return the writs, and that he was personally ruled to do so.] The practice as to the returns merely comes to this, that the serjeant makes the return in the name of his deputy instead of his own name. There could be no mode of proceeding against the serjeant on such returns unless these persons are his deputies; and it was proved, that, on returns made by them, attachments issued against the serjeant. These officers make a return of the amount of their fees, and pay them to the defendant, and they are found, when wanted to execute process, at his office; they are in every respect his officers. It has been said, that the declaration was not proved, because the delivering the writ to the defendant was not proved. That would apply to every declaration against a high sheriff, to whom a writ is never really delivered, though it is always so averred in the declaration; and it is proved by leaving the writ at the under-sheriff's office. In point of law, this writ must be considered as issuing to the serjeant at mace; if it issued to any other it would be void; as if a writ issues out of the superior Courts to any other but the sheriff it is void. *Grant v. Bagge* (b). That seems to shew, that, in the present case, Lord could derive no authority from the Court; and, if so, he must have derived it from the serjeant; and the latter must be held responsible for his acts in the execution of process.

Lord LYNDHURST, C. B.—These persons are appoint-

(a) Officer, D. 5. See Com. the proper officer.
Dig. Retorn, C. 2, that the return (b) 3 East, 128.
ought to be made in the name of

ed by the serjeant at mace, who takes an indemnity from them; they are his officers, and are so styled. After process has issued, the serjeant at mace is called on to make his return. Sometimes, on his being so called on, the return is made by these officers, whom I consider as his deputies; and I think that the returns so made are made by them as his deputies. The serjeant at mace receives all the fees for the execution of the process, and he takes an indemnity from these officers to secure him against their acts in the execution of such process. It appears to me, therefore, that the process in this case was directed to *Lord* as the officer of the serjeant at mace, and that the serjeant at mace is responsible for the acts of *Lord* in the execution of the process.

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BOLLAND, B.—I am of the same opinion. If the process, after mentioning the names of these persons, had contained the words “his officers,” no doubt could have been entertained of the responsibility of the serjeant at mace. These words do not appear in this process; but I see no objection to the plaintiff making out by parol evidence, that the persons to whom the process was directed were, in point of fact, the officers of the serjeant, and that processes are directed to them as being such officers. I think that the evidence made out this case, and that *Parkinson* is liable for the acts of those persons in the execution of process.

ALDERSON, B.—It is very desirable that the Borough Court of *Liverpool* should insert in their writs the words, “his officers,” after naming the individuals; for the present practice has the effect of throwing upon a plaintiff the burthen of connecting the officers with the serjeant at mace. In this case, I think that this proof has been supplied; and when evidence has been given that these officers are appointed by the serjeant, that he takes an indemnity against their acts, that he receives the

Erch. of Plets, fees, that he is ruled to return the writ, and that he is liable to an attachment for disobeying the rules of the Court, I think that the effect of such evidence is, that the serjeant at mace makes these persons his officers in each particular case. I was particularly struck by the fact, that, if it is wished that process should be executed by any other person, not being on the list of officers appointed by the serjeant, the name of such person is not introduced without consultation with the serjeant, and without a special indemnity being given to him.

GURNEY, B.—I am of the same opinion. I think that the appointment of these officers by the serjeant, the indemnity which he takes against their acts, the receipt of the fees by him, the rules to him to return the process, and the attachments which issue against him, all shew that he has placed these persons in the situation of his deputies, and he is therefore responsible for their acts. The rule to enter a verdict must be made absolute.

Rule absolute.

NATION *v.* TOZER and UNDERHAY.

One of two executors of a deceased tenant for a term of years entered into the demised premises:—

Held, that such entry did not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation.

AT the trial of this case, before *Patteson, J.*, at the last *Summer Assizes* for the county of *Somerset*, the plaintiff had a verdict, with leave to the defendant to move to enter a nonsuit. In *Michaelmas Term*, a rule was obtained for that purpose, against which cause was shewn in *Easter Term* by—

Erle for the plaintiff.

Barstow was heard for the defendants.

The pleadings and facts being fully stated by the Court in their judgment, it is not thought necessary to insert them here.

In this term, the judgment of the Court was delivered by—

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PARKE, B.—This case was argued before myself and my brothers *Bolland*, *Alderson*, and *Gurney*, during the last term, when cause was shewn against a rule to enter a nonsuit. The case was tried before my brother *Patteson* at the last *Summer Assizes* for *Somersetshire*, when a verdict was found for the plaintiff, with leave to move to enter a nonsuit. The two first counts, which were upon a special promise to surrender a certain dwelling-house to the plaintiff, and a third count, which was for double rent claimed to be due from the defendants for holding over, were not proved. The question arose on the fourth count, which was for use and occupation, to which there was a plea of the general issue, and also a special plea that the defendants ought not to be charged otherwise than as executors of *William Henry Tozer*, the lessee for years, at the rent of 48*l.*, because the messuage was of much less annual value, and they had derived no rent or profit from the demised premises, and had fully administered his effects. To this special plea there was a replication, that the defendants withheld possession, and did not offer to deliver up the demised premises at any time *before* the rent in question accrued due, or give notice that they were ready to do so, or that they had not any effects to be administered, and the rejoinder averred that they did give notice, and offered, *before* the rent became due, to give up the demised premises, and did not withhold possession. Upon the trial, it appeared that *W. H. Tozer* in his lifetime was tenant to the plaintiff, by a demise not under seal, dated 29th *January*, 1830, for seven years; that both the defendants were his executors and acted in that capacity; but the defendant *Underhay* alone entered and took possession, and no notice to quit or unconditional offer to give up the possession was proved until after the rent claimed became due; the issue therefore on the rejoinder to the special

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plea was properly found against the defendants, and the only question was, whether both defendants were liable in their individual capacities on the count for use and occupation. The learned Judge was of opinion, upon the trial, that the entry of one was the entry of both, so as to charge both in this form of action, but reserved the point for the decision of the Court. Upon consideration, we think the entry of and occupation by one executor is not sufficient to render the other liable, and that without an entry and occupation, this form of action is not maintainable against the other executor. There is no doubt but that several executors have a joint and entire interest in, and authority over, all the goods of the testator, including chattels real. *Com. Dig. Administrator* (B. 11.) In *Bacon's Abridgment*, Executors and Administrators, (D.), it is laid down, and rightly, that the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all; the act of one in disposing of the testator's effects, is the act of the other, to give validity to, and preclude him from avoiding it. And the act of one, in possessing himself of the effects, is the act of the other, so as to entitle him to a joint interest in possession, and a joint right of action if they are afterwards taken away. But the question is, whether the act of one, in taking possession of a chattel real or personal of the testator can create a new liability, and impose a charge on the other personally, and in his own individual character, which, without such act, would never have existed; and we think it cannot. If one executor takes possession of and uses a personal chattel, the other is not liable to the creditors for such act of his executor. So, if one executor enter and enjoy the land demised, and take the profits beyond the rent, the other executor would not be chargeable with the amount as assets to the creditors, the one who actually received would alone be responsible. In respect then to the creditors, the actual possession and

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use by one is not in law the possession and use by both, so as to attach a liability upon both; and it seems to us that, if, instead of disposing of the term, one of the executors takes the actual possession of and enjoys the land demised, such enjoyment is not by law the possession and enjoyment by both, and it does not render both chargeable to the lessor to pay a compensation to him for it, as joint occupiers in their own right. But, in order to support this action for use and occupation, it is necessary that the land should have been occupied by the defendant, his agents, or under-tenants, during the time for which the compensation is claimed for use and occupation, though it need not have been beneficially, or even *actually* so engaged, but the defendant might have taken possession, and continued to have the right of actual occupation, whenever he pleased to take it. Thus, where an *interesse termini* never took effect as a lease, the lessee not having entered, the action was held not to be maintainable. *Edge v. Strafford* (*a*). So, in *Nash v. Taillock* (*b*), where there was an agreement to pay rent annually, and a bankrupt occupied for a part of the year, and the defendants, his assignees, for the remainder till the rent became due, it was held, that, though the defendants might be liable to an action of debt for the whole rent which became due after the assignment, they were not liable in an action for use and occupation, except during the time that they occupied; and *Eyre*, C. J., said, that the remedy given by the stat. 11 Geo. 2, c. 19, was in its own nature not co-extensive with a contract for rent, nor did it seem to have been within the scope and purview of the act, to make it co-extensive with all the remedies for the recovery of the rents claimed to be due by the mere force of the contract for rent, but that the statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their

(*a*) 1 Cromp. & Jerv. 397.

(*b*) 2 H. Blac. 319.

Exch. of Pleas, ordinary remedy. In the case of *Bull v. Sibbs* (a), there
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was an actual occupation by the under-tenant of the lessee.

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In *Baker v. Holtpzafell* (b), there was an occupation by the lessee till the premises were burned down, and then as much occupation as the lessee chose to make use of. So, in the cases put by Chief Justice *Gibbs*, in *5 Taunt.* 519, and by Lord Chief Justice *Abbott*, in *2 Starkie's N. P. Cases*, 527, where the lessee had taken possession, and had the power of actually occupying when he pleased. But, in the present case, the defendant *Tozer* has never occupied by himself; and, if the occupation of the defendant *Underhay* does not affect him, he has never occupied at all. We therefore think he is not liable at all in this form of action. We do not say, whether he might or might not be liable jointly with his co-executor in their own right, even without entry by either, to an action of debt for rent accruing due after the testator's death, as the term vested in both by operation of law (for, after accepting the executorship, neither of them could waive the term) (c). All we decide is, that he is not liable to an action for the *use and occupation* of that of which neither he, nor any one whose act is in point of law his act, has been in the actual possession. For these reasons, we think that the rule must be absolute, to enter a nonsuit.

Rule absolute for entering a nonsuit.

(a) *8 T. R.* 327.

v. *Stevens*, 4 *B. & Adol.* 245, 246;

(b) *4 Taunt.* 45.

1 *N. & Man.* 182, *S. C.*

(c) See the judgment in *Rubery*

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BOYDELL v. M^CMICHAEL.

TROVER for certain stoves, grates, cisterns, &c.
Plea—the general issue.

At the trial before *Bolland, B.*, at the *Middlesex* Sit-tings in *Hilary Term*, it appeared that the defendant and another person had demised a house and certain premises in the *Strand* to *Ryan*, the bankrupt, for a term of years. The house, at the time of the demise, contained certain fixtures, *viz.* stoves, grates, pier glasses, wooden and glass partitions, leaden cistern and sink, dressers and shelves. These fixtures were taken at a valuation by the bankrupt, and the price of them paid to the lessors. In *November, 1832*, the plaintiff, who was an attorney, lent the bankrupt money, and, by way of security, took an assignment of the house, expressly including all fixtures on the premises. In *June, 1833*, *Ryan* became a bankrupt, and the defendant and another were chosen assignees. Conceiving that the fixtures above mentioned were within the order and disposition of the bankrupt at the time of his bankruptcy, the defendant directed them to be detached from the premises, and they accordingly were so, and were carried away. The defendant had notice of the mortgage, but refused to deliver up the articles in question. It was proved that the fixtures were of comparatively little value when severed from the premises; that they were worth about *80l.* when attached, but lost about two-thirds of that value when disannexed. The jury found a verdict for the plaintiff, with *75l.* damages; but the learned Judge gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that the fixtures in question passed to the assignees notwithstanding the mortgage. *Follett* having obtained a rule accordingly,

Erle and *Jardine* were to have shewn cause, but the Court called on—

Where *A.* took the lease of a house and premises for a term of years, and took the tenant's fixtures in the house at a valuation from the landlord, and afterwards assigned the term to *B.*, by way of mortgage, expressly including the fixtures, and subsequently became bankrupt:—*Held*, that the fixtures were not goods and chattels within the order and disposition of the bankrupt, and did not pass to his assignees.

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Follett, in support of the rule.—This action is brought by the plaintiff, who is a mortgagee of the premises; and he contends, that, as these were tenant's fixtures, they passed to him by the mortgage, and that they were, therefore, his property. But, if he is entitled to them at all, he is entitled to them as something distinct from the freehold; and, if so, then they are goods and chattels within the order and disposition of the bankrupt. The plaintiff has no interest in them, for either they are affixed to the freehold, and belong to the landlord, or, if not, they are goods and chattels within the order and disposition of the bankrupt. The assignment only passed the right to use the fixtures during the term. Suppose the case, where a tree is cut down on land during the existence of a term, and it is carried away by a stranger, the tenant is not entitled to maintain trover, but the landlord can only do so, as the property in it vests in him as soon as it is severed. The other cases on this subject were cases where the freehold was mortgaged; and, where the freehold passed, the fixtures passed as part of the freehold. But the articles in question, as between these parties, are goods and chattels within the order and disposition of the bankrupt. The bankrupt obtained credit by reason of the possession of them. [*Alderson*, B.—A man may obtain credit by reason of the apparent possession of real property, but that is not within the clause in the Bankrupt Act as to order and disposition. Here, the plaintiff could not have had any property in these articles, except under a conveyance of goods and chattels, and he therefore can have no right to them except as goods and chattels. He cited *Trappes v. Harter* (a) as in point.

PARKE, B.—I always considered that the case of *Horn*

v. *Baker* had determined that fixtures affixed to the freehold were not goods and chattels within the order and disposition of the bankrupt. These articles were part of the freehold during the term, the tenant having a right to remove them at the end of the term. The tenant assigned the term and the fixtures in the house to the plaintiff, and by that assignment the plaintiff acquired all the rights that the tenant had. The plaintiff took the house for the term, and every thing that was affixed to the freehold, and the tenant's right to remove the fixtures at the end of the term. Suppose a person enters a house, and severs part of the materials of the house, cannot the tenant bring trespass *de bonis asportatis*? I am aware, that, in the case of timber, the property in it, when severed, vests in the landlord; but you find no authority that the tenant cannot maintain trespass *de bonis asportatis* against a stranger who has severed and carried away the materials of a house. The tenant has a special property in the materials. In *Bowles' case* (a) it was said, that, where a house is blown down, the tenant has a special property in the timber to rebuild the house. It certainly has always been the practice to add a count *de bonis asportatis* in an action of trespass *quare clausum fregit*, when part of the materials or soil has been removed, whether the plaintiff was tenant in fee, or for life, or for years. The real nature of the tenant's interest in this case is, that he has a right to remove the fixtures during the term. That interest has been held sufficient to enable the sheriff to seize them under a *f. i. fa.*; but *Horn v. Baker* decides that they are not goods and chattels within the meaning of the clause as to the order and disposition of the bankrupt. The reason is this, that, with regard to real property, the possession is considered as nothing, but that the title only is looked to. In this case, it is clear that the plaintiff took the inter-

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(a) 11 Rep. 79; see also Bull. N. P. 33.

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 tenant's right to remove the fixtures during the term.

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ALDERSON, B.—This question turns entirely on the nature of the property. It is clear, that nothing of a freehold nature is within the meaning of the clause in the Bankrupt Act as to order and disposition. It was settled, by the case of *Horn v. Baker*, that fixtures were not within the meaning of the statute of *James*. It is immaterial whether the mortgagee acquires the right as tenant for life or for years. The simple and plain rule is, that fixtures are not goods and chattels within the order and disposition of the bankrupt.

Rule discharged (a).

(a) *Vide Ryall v. Rolle*, 1 Atk. 165; *Lingham v. Biggs*, 1 B. & P. 82; *Bryson v. Wylie*, Id. 83, n.; *Horn v. Baker*, 9 East, 215; *Steward v. Lombe*, 4 Moore, 281; 1 Bro. & Bingh. 506, *Dallas's judgment*; *Storer v. Hunter*, 5 D & R. 240; 3 B. & C. 368; *Clark v. Crownshaw*, 3 B. & Adol. 804; *Rufford v. Bishop*, 5 Russ. 346, *Hubbard v. Bagshaw*, 4 Sim. 326; *Trappes v. Harter*, 2 C. & M. 153. *Combs v. Beaumont*, 5 B. & Adol. 75; 2 M. & N. 235. That fixtures cannot generally be treated as goods and chattels, until detached from the freehold, see *Nutt v. Butler*, 5 Esp. 176; *Lee v. Risdon*, 2 Marsh. 495; *Niblett v. Smith*, 4 T. R. 504. In a *fi. fa.* against a lessee, who may himself remove them, they may be taken. See *Place v. Fagg*, 4 Man. & Ryl. 277—*Per Bayley, J.*; *Winn v. Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247; *Pitt v. Shew*, 4 B. & Ald. 206;

Evans v. Roberts, 5 Barn. & Cress. 841; 8 D. & R. 611. A transfer of property in fixtures, by way of mortgage, requires no transfer of possession to make it good as against other creditors. See *Steward v. Lombe, supra*; *Bayley, J.*, in *Place v. Fagg, supra*. In *Trappes v. Harter*, there were several peculiar circumstances, 2 C. & M. 153,—1st, The mortgage did not include the articles in question; 2ndly, There was a custom found to treat them as chattels of the lessee; 3rdly, They were all things used in the lessee's trade, and not (as here) domestic fixtures; 4thly, The mortgagee, who claimed them against the assignees, had himself, after the mortgage, and previously to the bankruptcy, concurred in representing to the creditors that they were part of the available assets of the bankrupt.

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TOOGOOD v. SPYRING.

SLANDER.—The first count of the declaration stated that the plaintiff, at the time of committing the grievances thereinafter mentioned, was a journeyman carpenter, and accustomed to employ himself as a journeyman carpenter, and gain his living by that employment, and had been, and was at the time of committing the grievances &c., retained and employed by, and in the service of, one *James Brinsdon*, as his journeyman carpenter and workman, at and for certain wages and rewards by the said *James Brinsdon* to him to be paid in that behalf; and in that capacity and character had always behaved and conducted himself with honesty, sobriety, and great industry and decorum, and never was, nor, until the time of committing the grievances, was suspected to have been or to be, dishonest, drunken, dissolute, vicious, or lazy, to wit, in the county aforesaid; by means of which said several premises he had not only acquired the good opinion of his neighbours and divers other good and worthy subjects, &c., and especially the high esteem of his masters and employers, but had also derived and acquired for himself divers great gains, &c. That the plaintiff, at the time of committing the grievances in the first, second, and last counts mentioned, had been employed by the said *James Brinsdon*, as his workman and journeyman, in and upon certain work, to wit, on and about certain premises of the defendant, and then and there, upon and throughout that occasion, and during the whole of his the plaintiff's work in and about the same, had behaved and conducted

A., the tenant of a farm, required some repairs to be done at the farm house, and *B.*, the agent of the landlord, directed *C.* to do the work. *C.* did it, but in a negligent manner, and, during the progress of it, got drunk; and some circumstances occurred which induced *A.* to believe that *C.* had broken open his cellar door and obtained access to his cyder. *A.*, two days afterwards, met *C.* in the presence of *D.*, and charged him with having broken his cellar door, and with having got drunk and spoilt the work. *A.* afterwards told *D.*, in the absence of *C.*, that he was confident *C.* had broken open the door. On the same day *A.* complained to *B.* that *C.* had been negligent in his work, had got drunk, and he thought he had broken

open his cellar door:—*Held*, that the complaint to *B.* was a privileged communication, if made *bond fide*, and without any malicious intention to injure *C.*:—*Held* also, that the statement made to *C.* in the presence of *D.* was also privileged, if done honestly and *bond fide*; and that the circumstance of its being made in the presence of a third person does not of itself make it unauthorized, and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether *A.* acted *bond fide*, or was influenced by malicious motives:—*Held* also, that the statement to *D.*, in the absence of *C.*, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.

Exch. of Pleas, himself with honesty, sobriety, and great industry and decorum, and in a proper and workmanlike manner, yet, the defendant, well knowing &c., but contriving &c., and to cause it to be suspected and believed that the plaintiff had been and was guilty of the offences and misconduct thereafter stated to have been charged upon and imputed to him by the defendant, theretofore, to wit, on the 9th of January, 1834, in the county aforesaid, in a certain discourse which the defendant then and there had with the plaintiff of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, in the presence and hearing of divers worthy subjects &c.; then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, the false, scandalous, malicious and defamatory words following, that is to say—“What a d——d pretty piece of work you (meaning the plaintiff) did at my house the other day.” And in answer to the following question, then and there, in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say—“What, Sir!”—then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and addressed to, and published of and concerning the plaintiff, and of and concerning him in relation and with reference to the aforesaid work, these other false, scandalous, malicious, and defamatory words following, that is to say—“You broke open my cellar door, and got drunk, and spoiled the job you were about,” (meaning the aforesaid work).

The words, as stated in the second count, were—“He broke open my cellar door, and got drunk, and spoiled the job he was about.”

In the third—That in answer to an assertion of the plaintiff that he had never broken into or entered the de-

fendant's cellar, the defendant said—" What! I will swear it, and so will my three men."

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The fourth count stated, that on &c., in a certain other discourse which the defendant then and there had *with a certain other person, to wit, one Richard Taylor*, of and concerning the plaintiff, in the presence and hearing of the said last-mentioned person, and of divers other good and worthy subjects, &c., and in answer to a certain question, whereby the last-mentioned person, to wit, the said *Richard Taylor*, did then and there, in the presence and hearing of the other last-mentioned subjects, interrogate and ask of the defendant, whether he, the defendant, meant to say that the plaintiff had broken into the cellar of the defendant, he, the defendant, then and there, in the presence and hearing of the last-mentioned subjects, falsely and maliciously answered, spoke, and published to the last-mentioned person, to wit, the said *Richard Taylor*, in his presence and hearing, these other false, scandalous, malicious, and defamatory words following, of and concerning the plaintiff, that is to say—" I" (meaning the defendant) " am sure he" (meaning the plaintiff) " did" (meaning that the plaintiff had broken into his the defendant's cellar); " and my" (meaning the defendant's) " people will swear it."

The words in the fifth count were alleged to be spoken generally, as in the first three, and not to any particular individual; and they were these—" You got drunk, and spoiled the job you were about," (meaning the aforesaid work). The declaration then alleged, that, by reason of the committing of the grievances, he, the plaintiff, was greatly injured in his good name, fame, character, occupation and credit, and brought into public scandal, &c., insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed and

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The defendant pleaded—*first*, the general issue; *secondly*, that, before the committing of the grievances, to wit, on the 7th *January*, 1834, the said plaintiff broke open a door of a cellar of the said defendant, in a house of the said defendant, and then and there broke into the said cellar, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned; wherefore he the said defendant did speak and publish the said words, as in the said declaration respectively mentioned, of and concerning and relating to the said house and the said cellar door, as he lawfully might for the cause aforesaid. And this, &c. *Thirdly*, as to the first, second, and last counts, and as to the speaking and publishing of the following words, that is to say—"I am sure he" (meaning the plaintiff) "did," (meaning that the said plaintiff had broken into

his the said defendant's cellar), as in the said fourth count of the declaration mentioned, that before &c., to wit, on the 7th of *January*, 1834, the said plaintiff broke open the door of a cellar of the said defendant in a house of the said defendant, and then and there broke into the cellar of the said defendant, and got drunk, and spoiled the said work in the introductory part of the said declaration mentioned; therefore, the said defendant did commit the supposed grievances in the introductory part of that plea mentioned, as he lawfully might for the cause aforesaid. And this &c.

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Replication—*De injuria* to the second and last plea.

At the trial, before *Bosanquet*, J., at the last *Spring Assizes* for the county of *Devon*, it appeared that the plaintiff was a journeyman carpenter and had been in the employ of *Brinsdon*, a master carpenter in the constant employ of the Earl of *Devon*, at *Powderham Castle*. That the defendant resided on a farm under the Earl of *Devon*. That the defendant required some repairs at his farm; and that, pursuant to the orders of Mr. *Brinsdon*, the plaintiff and another workman went to the defendant's residence on the 7th of *January*, for the purpose of erecting a new door to the defendant's tool-house (which adjoined the cellar), and doing other repairs to the house and premises of the defendant. It was proved that the work was done in a negligent manner, and not to *Brinsdon's* satisfaction, the door being cut so small as not to answer the purpose for which it was intended. That, during the progress of the work, the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar door and obtained access to his cyder. *Brinsdon* had requested the defendant to inspect the work. It was proved that the plaintiff and one *Taylor* were at work on the 9th of *January*, at *Powderham Castle*, and that the defendant came up, and addressing himself to the plaintiff, spoke in his presence the following words—“ What a d——d

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That the plaintiff said—"What, sir!"—and that the defendant replied—"You broke open my cellar door, and got drunk, and spoiled the job you were about." That the plaintiff denied the charges, but that the defendant said he would swear it, and so would his three men. It was also proved, that, in a *subsequent* conversation, *when the plaintiff was not present*, the defendant, in answer to a question put to him by *Taylor*, whether he really thought the plaintiff had broken the cellar door, said—"I am sure he did it, and my people will swear to it." That the defendant then went away in search of Mr. *Brinsdon*. It was proved that the defendant afterwards saw *Brinsdon* on the same day, the 9th of *January*, and that he said to him that *Toogood* had spoiled the door, and that the cellar had been broken open, and that *Toogood* had got drunk; he said, he considered it had been done with a chisel, and that *Toogood* did it, because of the getting drunk. It appeared that *Brinsdon* went afterwards to the plaintiff and told him, that he could be no longer in the employ of the Earl of *Devon* until this was cleared up; that he must come to the defendant's with the other workman the following morning to have the matter investigated; that he, *Brinsdon*, went to the defendant's the following morning, and that the plaintiff and defendant were there, and that he examined the cellar door, but doubted whether it had been broken open at all, though the bolt was broken; and *Brinsdon* told the plaintiff he considered the charge against him was not made out, and that he thought his character was cleared up, and that he might go to work again if he thought proper; but the plaintiff said his character was not cleared up; and he did not go to his work afterwards.

The learned Judge, in summing up the case to the jury, said, that he should have thought that the defendant would have been justified if he had made the complaint to Mr. *Brinsdon* in the first instance; but that he had spoken the

words in the presence of a third person, and that the speaking was not in the nature of a complaint to the plaintiff's employer. That it appeared to him that the act of making the imputation to the plaintiff in the presence of another person gave the plaintiff a right to maintain the action. That the plaintiff also was not justified in making the subsequent charge to *Taylor*, in the absence of the plaintiff, that he had broken open the cellar door. The jury having found a verdict for the plaintiff, with 40*s.* damages, *Follett*, in *Easter Term* last, obtained a rule to shew cause why a nonsuit should not be entered, or a new trial had, on the grounds—*first*, that the circumstances under which the words were spoken constituted it a privileged communication; and, *secondly*, on the ground of misdirection on the part of the learned Judge.

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Praed shewed cause.—There are two questions here—*first*, it is said that the words in question were spoken under circumstances which made it a privileged communication; and, *secondly*, that the case was improperly summed up to the jury. With regard to the first point, it is submitted that this went beyond the nature of a privileged communication. Even if the defendant would have been justified in stating what he did to *Brinsdon*, he could not justify speaking the words to the plaintiff in the presence of a third person. The defendant does not even say that he comes to complain to *Brinsdon*. In *Macdougall v. Claridge (a)*, Lord *Ellenborough*, in speaking of a communication as privileged, where it is made by one party interested to another having an interest in the same matter, complaining of the conduct of a person whom they had employed to manage their concerns, expressly puts it on the ground of the communication not being meant to go

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beyond those immediately interested in it. [*Alderson*, B.—Here the damages were taken generally. Now, who can say what damages the jury gave for what was said to *Brinsdon*, and what damages they gave for what was spoken before *Taylor*?] If the defendant had a right to complain that the work was improperly done, he had no right to charge the plaintiff with breaking open the cellar door and getting drunk, as that amounts to a charge of felony. It may be said, that there is no allegation in the declaration, that the defendant meant to impute felony to the plaintiff; that, however, is immaterial, as there is an allegation and proof of special damage. In *Moore v. Meagher* (*a*) it was held, that if, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of friends, that is a sufficient temporal damage whereon to maintain an action. [*Parke*, B.—Here there was no special damage proved.] It is submitted that there was evidence to go to the jury, as it was proved that *Brinsdon* said he would not employ the plaintiff until his character was cleared; and though he told him afterwards that he might go to his work again, the plaintiff did not do so, because his character was not cleared. [*Parke*, B.—To make out special damage in this case, you should have shewn that the plaintiff was removed from a beneficial employment, which you have not done. The jury did not find special damage—they gave general damages.] *Secondly*, it is submitted, that the case was properly left to the jury, as the circumstances under which the words were spoken shewed a malicious intention to injure the plaintiff. In *Dunman v. Bigg* (*b*), Lord *Ellenborough* said—“It will be for the jury to say whether these expressions were used with a malicious intention of degrading the plaintiff, or with good faith to communicate facts to the surety which he was interested to know.” Now, here,

the words were not spoken to the party alone, but before another person; and, as it was not necessary that the defendant should speak the words in *Taylor's* presence, or say what he did to *Taylor*, his doing so unnecessarily and officiously, is a circumstance from which malice may be inferred. Here the defendant was betrayed into a passion, and has gone beyond what he was justified in saying. In *Rogers v. Clifton* (*a*) it was held, that although a master is not in general bound to prove the truth of a character given by him to a person applying to him for the character of his servant, yet, if he officiously state any misconduct, even of a trivial nature, which he is not able to prove, the jury might, from these facts, infer malice. It depends much on the manner in which the words are spoken, whether they are to be deemed malicious or not. If I go to a tradesman, and, in a spiteful and revengeful manner before his other customers, say, that he has spoiled my coat, or sent me a bad joint of meat, that is conduct from which malice may be inferred. Besides, the plaintiff was not in the employ of the defendant, but in the employ of *Brinsdon*, and therefore the defendant had no right to complain of him. Here, the defendant has, at all events, gone beyond the limits of a confidential communication, in charging the plaintiff with breaking the cellar door and getting drunk. In *Godson v. Home* (*b*), *Richardson*, J., says—"If a man, giving advice, calls another a thief, surely it is not necessary to leave it to the jury whether such language is a privileged communication or not." Here, although the word thief is not used, the defendant says what is equivalent to it. It is quite clear the defendant meant more than to complain of the work being spoiled. If a man say to his tailor, in the presence of customers, "you sent me a bad coat," though he might be justified in speaking those words, he

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Exch. of Pleas, cannot be justified in saying, "you sent me a bad coat;
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Follett, contrà.—In this case no special damage was proved, as the plaintiff was not dismissed by *Brinsdon*. When *Brinsdon* found that the door had not been broken open, he directed the plaintiff to go to his work again, but he did not do so; and therefore, if he suffered any damage, it was his own fault. The words spoken to *Taylor* were not spoken of the plaintiff in the way of his trade. [*Parke*, B.—Might not the words be spoken of him in his character of a journeyman carpenter. They might be spoken of him as having committed a felony in the course of his trade. It might be that he availed himself of his situation to commit the felony.] It is submitted, that such a general proposition cannot be laid down. Here, it was no part of the business of the carpenter to break open the cellar door. It is an act totally unconnected with his business as a carpenter, and those words are not spoken of him in the character of a carpenter. Words to be spoken of a man in his trade must relate to something done by him in the course of his particular calling. Besides, if the plaintiff had meant to say that the defendant had imputed felony to him, he should have alleged it in his declaration; there is, however, no such allegation or innuendo in this declaration. Suppose the words had been, "he had cheated his fellow-workmen," would they be actionable? It is submitted that they would not, inasmuch as they would have no relation to the plaintiff's trade. [*Alderson*, B.—"You are an idle, dissolute workman; and when employed by me you robbed me:" are not these words actionable?] At all events, it was a question for the jury whether these words were spoken of the plaintiff in his trade, and that question was not left to them; therefore, the defendant is entitled to a new trial. Then, the learned Judge said that the defendant had no right to make the complaint in the presence of a third person;

but surely a master has a right to complain of his servant in the presence of a third person, if it is done *bond fide*. If that were not so, in every case where the master complains of his servant in the presence of a third person, the servant would have a right of action against the master. Can it be said that a person who complains to a tradesman has no right to say in the presence of a third person that the work is badly done, when the complaint is made *bond fide*? [Alderson, B.—You say that it is only evidence, more or less, of malice; but there is a communication to Taylor alone, which is not justified.] The complaint to Brinsdon was, at all events, justifiable. The Court cannot know what damages the jury gave for those words, and what for the others, as the damages are general. If the complaint is made under circumstances that induce the party to believe in the truth of it, and he makes the complaint to the other party *bond fide*, it is privileged. All the cases where it has been held that the communications were not justifiable, were made to a third party, and not to the party himself. [Alderson, B.—There are many cases in which words spoken in the presence of a third party have been held actionable, where the transaction was gone by, so that the party complained of was not able to right himself.] Here, the complaint was made at the time. It is submitted, that the learned Judge ought to have nonsuited. [Alderson, B.—Surely it was a question for the jury.] It is only where there is some evidence to shew that the defendant is not acting *bond fide* that it becomes a question for the jury. But, where a party *bond fide* complains that work is badly done, it is a question of law, whether it is a privileged communication or not.

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On a subsequent day, the judgment of the Court was delivered by—

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PARKE, B.—In this case, which was argued before my Brothers *Bolland*, *Alderson*, *Gurney*, and myself, a motion was made for a nonsuit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of *Devon*, required some work to be done on the premises occupied by him under the Earl, and the plaintiff, who was generally employed by *Brinsdon*, the Earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door, and so obtained access to his cyder. The defendant a day or two afterwards met the plaintiff in the presence of a person named *Taylor*, and charged him with having broken open his cellar door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to look for *Brinsdon*; he afterwards returned and spoke to *Taylor*, in the absence of the plaintiff; and, in answer to a question of *Taylor's*, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw *Brinsdon*, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned Judge thought that the statement to *Brinsdon* might be so, but not the charge made in the presence of *Taylor*; and in respect of that charge, and of what was afterwards said to *Taylor*, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to *Brinsdon* was pro-

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tected, and that the statement, upon the second meeting, to *Taylor*, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of *Taylor*, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publication affords a defence in the absence of express malice. In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is, that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed (*a*)), the simple fact that there has been

(*a*) *Child v. Affleck*, 4 Man. & Ryl. 590; 9 B. & C. 403.

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some casual bye-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bond fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means *of necessity* take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is *sought* for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bond fide* in making the charge, or been influenced by malicious motives. In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact, that the imputation was made in *Taylor's* presence, does not, *of itself*, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned Judge, that the statement to *Taylor*, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief

of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned Judge was wrong in his opinion as to the statement to the plaintiff in *Taylor's* presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

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Rule absolute for a new trial.

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JACOBS v. PHILLIPS.

FOLLETT had obtained a rule for discharging a bankrupt who had obtained his certificate out of custody, on an attachment for non-payment of costs. It appeared upon the affidavits, that this cause was called on for trial at the *London* Sittings after last *Michaelmas* Term, when, in consequence of the absence of a necessary witness on behalf of the defendant, the trial was, by an order of *Nisi Prius*, ordered to be postponed, on payment of the costs of the day by the defendant, until *Hilary* Term then next. That such costs were shortly afterwards taxed at 1*31l. 9s.* (a), upon the affidavit of the plaintiff and a clerk of the plaintiff's attorney, that fifteen witnesses were subpoenaed and in attendance on the part of the plaintiff. That the said order of *Nisi Prius* was made a rule of this Court in *Hilary* Term last. That, by an order made by the Hon. Mr. Baron *Bolland*, on the application of the plaintiff, on the 28th day of *January* last, the trial was postponed until the costs of the day should be paid by the defendant, pur-

A bankrupt is discharged by his certificate from interlocutory costs ordered by the Court at *Nisi Prius* to be paid by him on a trial, in a cause in which he was defendant, being postponed at his instance, on account of the absence of a material witness, if such costs have been taxed before the bankruptcy.

The certificate must be enrolled before the Court can act upon it, so as to discharge the bankrupt.

(a) Before the bankruptcy.

Exch. of Pleas, suant to the said rule of Court. That, on the 24th day of *January* last, a fiat in bankruptcy was issued against the said defendant, under which he was declared a bankrupt. That the defendant was taken into custody on or about the 21st day of *April* last, upon and by virtue of an attachment issued out of this Court, for non-payment of the said sum of 131*l.* 9*s.*, a previous demand thereof having been made from the said defendant. That the said defendant has obtained his certificate, duly granted to him under the said fiat, bearing date the 22nd day of *April* last; and which was confirmed by the Court of Review in bankruptcy, on the 17th day of *May* last.

When the case came on it was objected, that it did not appear that the certificate was inrolled of record, according to the provisions of the Bankrupt Act, 6 Geo. 4, c. 16, s. 128. It was urged in answer, that the bankrupt was entitled to be discharged on the certificate being allowed, not on its being inrolled.

Lord LYNDHURST, C. B.—How can we say that it was allowed, without the proof of that fact required by the statute. The bankrupt is to be discharged on the *production* (*a*) of the certificate. The certificate could not be read by us unless it were inrolled; and the affidavits are

(*a*) See s. 128.—In *Cheshire v. Hooper*, K. B. Michaelmas Term, 1831, a rule had been obtained against the sheriff of the county of *Warwick*, one of his officers, and the plaintiff's attorney, calling upon them to shew cause why a sum paid by the defendant under a *ca. sa.* should not be returned to the defendant, who had obtained his certificate after the judgment, but before the execution, and had informed the officer making the arrest thereof. The certificate was not produced either to the officer who made the ar-

rest, or to the Court in moving for the rule, or upon cause being shewn. *Platt* and *White* shewed cause, and contended that the 128th section of the Bankrupt Act, 6 Geo. 4, was imperative as to the production of the certificate. *Crompton* was heard in support of the rule. *Putteson*, J., held that the bankrupt could only be discharged on the production of the certificate. And the motion being the same in effect as a motion to discharge him out of custody, the rule was discharged with costs.

only a substitution for the certificate. The safest way is *Exch. of Plea*
to enlarge the rule until the document is inrolled. *1834.*

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It was afterwards agreed to argue the question; and that the rule, if absolute, should not be drawn up until the inrolment of the certificate.

Hutchinson shewed cause.—A bankrupt is only discharged by his certificate from *debts* due from him, or claims or demands made proveable by the Bankrupt Act. In the present case, it is clear that there was no debt, nor was the demand or claim a demand made proveable by the Bankrupt Act. There are no words in the 6 Geo. 4 similar to the words in the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 60, whereby the insolvent is discharged from *costs*, and from the effects of every decree or order for the same. The discharge under the Bankrupt Act is regulated by the 121st section; and is confined to the case of debts, and to that of "all claims and demands hereby made proveable under the commission." This latter branch plainly refers to such claims and demands as would subsequently have become debts, such as debts payable at a future day, and to some cases of ascertained demands, such as annuities, which can be calculated, though not payable until a future time or times. It is perfectly clear that debt would not lie upon such an order as that made at *Nisi Prius* in the present case. *Emerson v. Lashley* (a), and *Fry v. Malcolm* (b), are decisive that no action will lie on such a rule of Court. In *Carpenter v. Thorn-ton* (c), it was held that no action at law would lie upon a decree of a Court of equity. There is no difference between the order of a Court of law and of equity in this respect. *Ex parte Stevenson* (d) goes further, and decides

(a) 2 H. Bl. 251.

(c) 3 B. & Ald. 52.

(b) 4 Taunt. 705.

(d) 1 Mont. & M'Arthur, 262.

Exch. of Pleas, that such a demand is not even sufficient for a good petitioning creditor's debt. But it may perhaps be said, that this is an agreement upon which an action is maintainable. An agreement is the assent of two minds. Here, on the part of the plaintiff, there was no assent, but every possible resistance to the putting off of the cause. The cause was put off against his wish, and against his interest. The Court says, that he shall be indemnified against the costs of the day, which he has incurred uselessly, as the cause is put off. It is true, he afterwards attempts to enforce the order for payment of those costs, but that is no evidence that they were due to him by an agreement, when he always dissented from the agreement as far as lay in his power. How could a declaration be framed as upon an agreement in this case; and what consideration could be stated? The decision in *Riley v. Byrne* (a) proceeded entirely upon the agreement which arose out of the compromise in that case. The Court there said, that the defendant had agreed, upon good consideration, to pay what should be found due for the plaintiff's costs. In *Rex v. Edwards* (b), the attachment was for a previous debt; and in *Ex parte Eicke* (c), there were two specific sums due before the bankruptcy, to which the costs attached themselves. *Ex parte Hill* (d), and the cases there cited, are all of this description. The Courts in such cases have always acted upon the principle, that the costs have reference to the debt, are incorporated with it, and, being accessorial, cannot be separated from it. That class of cases then only shews, that, where the bankrupt is discharged from the debt, the costs cannot be severed from the debt, so as to render the bankrupt liable for the costs, which are merely accessorial. All these are cases of costs incurred in the prosecution of a claim, which claim has been barred by the certificate.

(a) 2 B. & Adol. 779.

(b) 9 B. & C. 652.

(c) 1 Glynn & Jam. 261.

(d) 11 Ves. 646.

Follett, contrà.—It is not necessary to contend that what passed in this case amounted to an agreement. The proposition on the other side is, that the bankrupt is not entitled to his discharge, unless in the case of a debt on which an action can be maintained. There are, however, many cases where a demand is proveable under a commission, and is barred by the certificate, where there is no debt, and where no action would lie. The rule is, that the demand must be *ascertained*. It is perfectly immaterial whether an action will lie, or whether the demand can only be recovered in equity, or by an attachment in a Court of law or of equity. There is a broad distinction between what is a sufficient petitioning creditor's debt to support a commission, and what is proveable under the commission, and barred by the certificate. It is quite clear that a petitioning creditor's debt must be a legal one, but that is not so as to a demand being proveable under a commission. It does not, therefore, at all follow, from a case which shews that a demand is not sufficient for a petitioning creditor's debt, that such demand is not proveable under a commission. This distinction was taken and acted upon in *Ex parte Charles* (a). In *Eden's Bankrupt Law*, it is laid down (b) that the petitioning creditor's debt, to support a commission, must be a legal debt; and he puts the case of a debt due from one partner to another, as an instance where a debt, not being a legal one, will not support a commission. *Gregory v. Hurrill* (c) was a question as to whether a debt, barred by the Statute of Limitations at the time of the commission issuing, was such a debt as would support the commission, continuances having been (subsequently to the issuing of the commission) entered on the roll, in an action which had been brought more than six years before. In that case the debt was proveable under the commission, and barred by the cer-

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(a) 14 East, 210.

8 Moore, 189; 1 Bingh. 336; 8 D.

(b) 2nd ed. p. 42.

& R. 270; 5 B. & C. 341.

(c) 3 B. & B. 212; 6 Moore, 525;

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tificate; but Lord *Eldon* thought that it did not support the commission, and was dissatisfied with the opinion of the Court of *Common Pleas* pronounced upon the case on two occasions; he directed another case to the Court of *King's Bench*, who held that the debt did not support the commission. The cause was subsequently decided in conformity with the opinion of the *King's Bench*. So, taxes, church and highway rates may be proved (*a*), but no action could have been maintained in these cases. The criterion then is not whether an action can be maintained, but whether the amount is ascertained. If it is ascertained, and can be enforced in any manner, whether at law, in equity, or by attachment either of a Court of law or of equity, it may be proved, and the bankrupt is discharged from it by his certificate. The policy of the bankrupt law is to make the discharge of the debtor as wide as possible; for it strips the bankrupt of his property, and leaves him nothing to pay with, and it would be hard, indeed, if the enactment for his discharge did not receive a liberal construction. In the case of a legacy no action is maintainable, but it is every day's practice for a legatee to prove under the commission. There is no case where a demand, which has been complete and ascertained before the bankruptcy, has been held not to be proveable under the commission, and not to be barred by the certificate. In all the cases which have occurred on the subject of costs, the costs have not been taxed before the bankruptcy. So, when the question has arisen in actions of *tort*, the criterion has been, whether the verdict has been obtained before or after the bankruptcy; and though it was held in *Ex parte Charles*, that a verdict for damages for a *tort* was not a good petitioning creditor's debt, yet that case does not decide that such a demand is not proveable under the commission, or barred by the certificate. So, in *Ex parte Hill* (*b*), the verdict and

(*a*) *Eden's Bankrupt Law*, 101, 102.

(*b*) 11 Ves. 646.

judgment were after the bankruptcy, and it was held that the costs could not be proved. Why? because they were not liquidated and ascertained until after the bankruptcy. [Lord *Lyndhurst*, C. B.—There is no doubt that costs are barred by the certificate, when they are connected with a proveable demand, as when they are taxed on a judgment upon a verdict for a debt obtained before the bankruptcy. The present is a case of interlocutory costs.] The proposition contended for on behalf of this bankrupt is, that every claim of a pecuniary nature, the amount of which is ascertained before the bankruptcy, is barred by the commission, whatever may be the mode by which such demand is to be enforced. The case of a contempt, strictly so called, as for a disobedience to a *subpœna*, is different. The cases which decide that an action at law will not lie on an order for costs, or on a decree in equity, may all be admitted. In *Carpenter v. Thornton* (a), the action was brought on a decree of the Court of *Chancery* for a specific sum of money, to which the party was equitably entitled; it was held that an action could not be maintained; but could it possibly be contended that the demand was not proveable? Equitable debts and demands are constantly proved; and the demand in *Carpenter v. Thornton* was clearly proveable, as being a pecuniary demand, ascertained before the bankruptcy. Again, suppose one partner files a bill against another, and has a decree for a sum of money, it is clear that no action at law could be maintained; but it is equally clear that it would be proveable, being an ascertained demand. So, in all the cases collected in *Eden's Bankrupt Law*, as to collectors of taxes, rates, &c., no action was maintainable. [Alderson, B.—In most of those cases there was a remedy against the goods of the party. Are there any

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Exch. of Pleas, cases where the remedy is only against his person, in which the demand has been held proveable?] All cases of equitable debts and demands are cases of that description. Nothing can be better settled than that an equitable debt is proveable, and in equity the only remedy is *in personam*. There are also cases in which a bankrupt is entitled to be discharged, although the amount is not proveable under the commission (a). *Ex parte Hill* (b); *Ex parte Poucher* (c). [*Bolland*, B.—In *Ex parte Haswell v. Thoro-good* (d), a cause and all matters in difference were referred, by order of *Nisi Prius*, to an arbitrator, who found that a sum of money was due from the plaintiff, the bankrupt, to the defendant, and ordered that sum to be paid; the bankruptcy happened before the costs were taxed, or the judgment of nonsuit signed, and it was held that the bankrupt was not discharged.] There the costs were not completely ascertained by taxation until after the bankruptcy. In *Ex parte Eicke*, it was held that the bankrupt was discharged from costs which had been ascertained by taxation before the bankruptcy, though it is clear that no action would have lain for such costs. The only semblance of authority against the present application is *Ex parte Stephenson*. That case is, however, clearly distinguishable, as being a question on the petitioning creditor's debt, which must be a legal debt.

Lord LYNDHURST, C. B.—The amount seems to be ascertained by the *allocatur* in this case. The question is one of very great importance, and we will consider it.

Cur. adv. vult.

Upon a subsequent day Lord LYNDHURST, C. B., said—
We have considered this question, and we are all of

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| (a) Eden's Bankrupt Law, 413. | (c) 1 Glynn & Jam. 386. |
| (b) 11 Ves. 646. | (d) 7 B. & C. 705. |

opinion that the bankrupt is entitled to his discharge. We have come to this conclusion, not at all upon the ground that there was an agreement between the parties. Taking all the circumstances of the case into consideration, we think that no agreement existed; but we think that there was an ascertained claim or demand before the bankruptcy, from which the bankrupt was discharged by his certificate; and, consequently, that this rule for his discharge out of custody must be made absolute.

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Rule absolute, on the certificate being inrolled.



**RAVENS CROFT v. WISE, ANDERSON, D. S. WYLIE, and
S. WYLIE.**

INDEBITATUS assumpsit for wages, as master of a certain vessel for the defendants, and on their retainer; there were also counts for work and labour, the money counts, and account stated. Plea—the general issue, with notice of set-off.

At the trial before *Bolland, B.*, at the last *Lent Assizes* for the county of *Chester*, the plaintiff proved the defendant *Wise's* handwriting to a contract, signed *Anderson, Wise & Co.*, by which it was agreed between those persons and the plaintiff, that the latter should command the brig "*Indian*," at the yearly wages of 100*l.*, with several allowances therein mentioned. There was no date to the agreement; but the plaintiff proved that he had been in the command of the "*Indian*" for several

In an action of *indebitatus assumpsit* by the master of a ship, for wages, against *A., W., D. S. W., and S. W.*, the plaintiff proved a contract in the handwriting of *W.*, signed *A., W., & Co.*, by which contract he was engaged as master of a vessel, at a yearly salary. He also proved services under the contract for several years; and he then put in a rule to pay

into Court a sum of money which was not equal to the amount of the wages. It appeared, on the part of the defendants, that *D. S. W.* was not a member of the firm of *A., W., & Co.*, and was not an owner of the ship in question. The defendant, in the course of his case, went into accounts including a variety of items, being disbursements on ship's account, on the one hand, and items, to the credit of the owners, on the other:—*Held*, that, under the circumstances, the whole account was referable to one contract, and that the four defendants, having paid money into Court, were precluded from setting up, that one of the defendants, *D. S. W.*, was not a party to the contract.

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years, until he was dismissed by *Anderson, Wise, & Co.*, by a letter which was proved. The plaintiff then put in a rule to pay 61*l.* into Court. On the part of the defendants it was contended that the plaintiff must be nonsuited on this evidence; and it was submitted that payment of money into Court on an *indebitatus* count would not, under the circumstances, make out a *prima facie* case against the four defendants. The learned Judge reserved the point; and the defendants then proved that the defendant *D. S. Wylie* was not a partner at the time of the contract, or ever afterwards, and that he was not an owner of the vessel, his name not having been on the register for some time previous to the plaintiff taking the command of the vessel. The defendants then went into evidence of the ship's accounts and disbursements during a long *Indian* voyage which she had made under the command of the plaintiff. It was ultimately agreed that the accounts should be referred, subject to a motion to this Court to enter a nonsuit.

In *Easter Term*, *John Evans* obtained a rule to enter a nonsuit, against which cause was now shewn by—

Crompton and Lloyd.—The payment of money into Court on a count charging the four defendants as liable to the plaintiff for wages as master of a ship on the retainer of the defendants, coupled with the fact of service under a contract, for the command of a vessel, made by the defendant *Wise*, in the name of *Anderson, Wise, & Co.*, was conclusive, as against the defendants, that they were the parties liable under that contract. *Walker v. Rawson* (a) is expressly in point. The only difference is, that, in that case, it was proved that another plaintiff ought to have been joined; in the present, it is said that too many defendants have been joined. The same objection was

(a) *Moody & Robinson*, 250.

taken in that case as in the present; and *Seaton v. Benedict* being cited, *Tindal*, C. J., said, "The present case is different from that cited. There, the action was brought to recover the price of goods supplied to the defendant's wife; each article might there be treated as the subject of a separate contract, and the payment of money might therefore admit a liability as to some articles, and leave others disputed. But, here, if the defendant is liable in respect of any of the work done, he is liable in respect of the whole of the work, for the contract was one; and the only question is, whether it was made with the plaintiff alone, or with the plaintiff and *Burgess* jointly. Now, the defendant, being sued by the plaintiff alone, pays money into Court, and thereby admits that he is content to treat the contract as made with the plaintiff only. I certainly, therefore, shall not nonsuit the plaintiff, but the defendant shall have leave to move if he pleases." It was not thought worth while, in that case, to move on the point reserved. It is submitted that the correct rule is, that payment of money into Court admits conclusively every thing which it would have been necessary to prove to have recovered that sum. If there be only one entire contract to which the payment must be referred, that is admitted, whatever be the form of declaration. If there be different items under different contracts, payment into Court as to some items does not admit the others, or prevent the defendant from disputing them. It is true that there are passages in some of the recent cases, where a payment of money on the *indebitatus assumpsit* counts is spoken of as having a different effect from that of a payment on a count upon a special contract. But these are all cases where the contract has been divisible. In *indebitatus assumpsit*, it is consistent with the form of the count that the contract may have been an entire contract, or may have been divisible. If it appears on the evidence to have been one, the payment of money into Court precludes the defendants from disputing that contract. That was the dis-

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tinction taken by *Gaselee*, J., in *Seaton v. Benedict*; and that is the way in which Lord Chief Justice *Tindal* explains that case in *Walker v. Rawson*. In *indebitatus assumpsit*, it often happens that a party is liable upon one contract, and not upon another, both of which are contained in the general count. As in *indebitatus assumpsit* for goods supplied, where there has been a sum paid into Court, and on the evidence it appears that the goods supplied were partly necessaries and suitable to the condition of the wife of the defendant, and partly not, it would be very strange if, because he had paid money into Court for what he was liable, that he should be bound for that which the wife had no authority to make him liable for. So, in the case of any other agent, the payment of money into Court would not shew that the particular person was agent on all the occasions, though he might be in the one to which the payment had reference. So, in *Long v. Greville* (a), one part of the demand under the general count might be barred under the Statute of Limitations, and the other not, the allegation in the count being divisible. It would be very unjust, if, admitting one of a number of items to be due, should preclude the defendant from shewing that he has a defence as to other items. *Meagher v. Smith* (b) shews that the circumstances of the case are to be taken into consideration, to see whether there is only one entire contract, in which case the payment into Court admits the contract; or whether the contract is divisible. The difficulty in that case was as to applying the rule, but the principle was admitted. The evidence given by the defendant does not alter the case, for wherever the rule applies it is conclusive. *Bulwer v. Horne* (c). They were then stopped by the Court.

John Evans and John Jervis, in support of the rule.—

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| (a) 3 B. & C. 10; 4 D. & R. | & Man. 449, S. C. |
| 632. | (c) 1 Nev. & M. 117; 4 B. & |
| (b) 4 B. & Adol. 673; 1 Nev. | Adol. 132. |

A payment of money into Court, on a declaration of this nature, does not fix all the defendants with a liability on a contract entered into by some of them only. If so, defendants might be charged to any amount on contracts which they had never entered into, if one of the number had done so. The rule is, that payment of money into Court, on a count in *indebitatus assumpsit*, admits only a liability to the extent of the money paid in. That is the effect of the recent decisions. In *Tidd's Practice* (a) it is said, that it is considered as paid before action brought, and is if struck out of the declaration. So, in *Meagher v. Smith*, it is said, by *Parke*, J., to operate only as a payment before action brought, which certainly would only conclude the party to that amount. In *Tidd's Practice* it is also said (b), "But payment of money into Court generally upon a declaration containing a count on a policy of assurance and the money counts is only an admission of the contract, but does not preclude the defendant from disputing his liability beyond such payment." [Lord *Lyndhurst*, C. B.—The difference between a payment to the party before action brought and a payment into Court is, that the former is only *prima facie* evidence, the latter is conclusive.] *Blackburn v. Scholes* (c) was an action of *indebitatus assumpsit* for goods sold, and 5*l.* was paid into Court. Particulars of the plaintiff's demand had been given, by which it appeared that the action was brought to recover the price of ninety-four bags of cotton wool, sold for the plaintiff to the defendants by Messrs. *Kenyon & Co.* It appeared in evidence that Messrs. *Kenyon & Co.* had sold the ninety-four bags to the defendants in one lot. It was objected that it was necessary to prove the plaintiffs' property in the goods; the plaintiffs' counsel contended that it was admitted

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(a) 8th edit. 675.

(b) Id. 676; 2 M. & S. 106.

(c) 2 Campb. 340.

Each of Pleas, by the payment of money into Court, and it was said that
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Ravenstock v. the goods were all sold at one time, and that the defendants could not, after paying money into Court, dispute the property being in the plaintiff. On the part of the defendant, however, the distinction between a payment on a general and a special count was taken; and Lord *Ellenborough* ruled that the plaintiff was bound to prove that the goods were his property. [Lord *Lyndhurst*, C. B.—The brokers in that case sold the goods in their own name. It did not follow that all which they sold in one lot belonged to the same person; payment of money into Court did not, therefore, admit that the property in the whole lot was in the plaintiff.] In the present case, besides the question as to wages arising out of this contract, there was a long account of disbursements during the voyage for many years. The dispute in the cause was on these disbursements, consisting of a variety of items, and not upon the question of wages, which were allowed and settled in account. The defendants had surely a right to shew that they were not the parties liable for such disbursements. [Lord *Lyndhurst*, C. B.—The plaintiff was the captain of a ship on a long voyage, and during that voyage he laid out money; his duty was the result of the contract proved, and all the money laid out was referable to it. Suppose I employ a man to do work, he may split it into a thousand items; but, as against me, it is all under one contract, although, with regard to the persons he employs, there may be a variety of disbursements.] In *Long v. Greville* (a), payment of money into Court was held not to preclude the defendant from setting up the Statute of Limitations; and the Court said, “here no special contract is set out. The declaration only stated, that so much money was due. The payment of money into Court was equivalent to saying so much is due, and

no more." [Lord Lyndhurst, C. B.—That was a case of many contracts. It wanted that which exists in the present case—the original contract, which ties and binds the whole together. In *Long v. Greville*, they were all severally. The question in this case is, whether any one was bound to pay under the contract; if one was, all were; for they have all paid money into Court, and none of them are liable, except upon the footing of this contract. All that was done here was done by the plaintiff in his situation of captain; whether properly or improperly is a question on the merits.] In *Meagher v. Smith*, there was a unity of contract; but the Court, nevertheless, thought that the defendant was not concluded as to his liability by payment of money into Court on a general *indebitatus* count.

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BOLLAND, B. (a), after stating the facts of the case, proceeded as follows:—The present application is to enter a nonsuit; and it is objected on the part of these defendants, that payment into Court on an *indebitatus* count does not bind the defendants beyond the amount of the money so paid in. It appeared to me at the trial that this was one entire contract, made between the owners on the one hand, and the captain on the other; and I have remained of that opinion throughout the argument. There was no claim made on the part of the plaintiff of any thing which did not appertain to him in the character of captain. The claim consisted entirely of wages and disbursements alleged to be made on account of the ship. The contest was, whether the owners were chargeable with those disbursements, or whether the captain must be taken to have paid them out of his own individual monies. It appears to me, therefore, that the whole matter in dispute was referable to one contract only, and that, by the payment

(a) Lord Lyndhurst, C. B., had left the Court.

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RAVENSCROFT the present rule for entering a nonsuit must be discharged.
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ALDERSON, B.—I am of the same opinion. The moment that it appears that there was, in point of fact, but one contract, the payment of money into Court admits the defendants to be parties to that contract. In the case of a general count, proof that there is only one contract places the party in the same situation as if the contract were stated specially on the face of the declaration, and then the payment of money into Court admits such contract, leaving it open to dispute whether any thing is due on the contract beyond the money paid into Court. In the present case, proof was given that there was only one contract to which the payment into Court could be referred; and it follows, that the defendants were only at liberty to dispute whether any thing beyond the money paid into Court was due under that contract.

GURNEY, B.—If these defendants had intended to dispute their liability, they should not have paid money into Court. They contended, at the trial, that they were not liable at all. That defence, under the circumstances of the case, was perfectly inconsistent with the payment of money into Court. The rule must be discharged.

Rule discharged.

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CASE.—The first count of the declaration stated, that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter mentioned, was and from thence hitherto hath been and still is *lawfully possessed* of a certain wharf, close, and premises, with the appurtenances, situate, lying, and being in the county of Worcester, and by reason thereof the said plaintiff, during all the time aforesaid, *ought to have had*, and *still of right ought to have*, a certain way from the said wharf, close, and premises, into, through, and along a certain close, and from thence into, through, and along a certain road or way unto and into a certain common king's highway, and so from thence back again from the said king's highway into, through, and along the said road or way, into, through, and along the said close, unto and into the said wharf, close, and premises respectively, so in the possession of the said plaintiff, for himself and his servants on foot, and with horses, mares, and geldings, carts and waggons, and other carriages, to go, return, pass, and repass every year, and at all times of the year, at his and their free will and pleasure, as to the said wharf, close, and premises, with the appurtenances, of the said plaintiff belonging and appertaining; yet the said defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst he, the said plaintiff, was so possessed of his said wharf, close, and premises, with the appurtenances as aforesaid, to wit, on, &c. and on divers

Where a way had been used adversely and under a claim of right, for more than twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester:—*Held*, that under the act 2 & 3 Will. 4, c. 71, this user gave no right as against the bishop, and did not affect the see.

Held also, that, as the user could not give a title as against all persons having estates in the *locus in quo*, it gave no title as against the lessee and the persons claiming under him, and that no title was gained by an user which did not give a valid title as against the bishop, and permanently affect the see.

The declaration for disturbance of the above-mentioned right of way alleged that the plaintiff was possessed of a certain wharf,

close, and premises, and by reason thereof ought to have had, and still of right ought to have, a certain way from this wharf, close, and premises into &c. (describing the way), as to the said wharf and premises belonging and appertaining:—*Held*, that the declaration was sufficient, and that the way might be claimed as appurtenant to the plaintiff's possession of the land at the time of the injury committed.

Exch. of Pleas, other days and times between that day and the commencement of this suit in the county aforesaid, wrongfully and injuriously placed and erected, and caused to be erected and built, divers, to wit, five gates in and across the said way; and put and placed, and caused and procured to be put and placed, divers large quantities of posts, planks, wood, and timber in the said way, and kept and continued the said gates so put, placed, and erected in and across the said way as aforesaid, and also the said other posts, planks, wood, and timber, in the same way as aforesaid, for a long space of time, to wit, from thenceforth hitherto, and thereby, during all the time aforesaid, the said way was and still is greatly obstructed and stopped up. By means whereof, &c. the said plaintiff could not enjoy, &c. &c. There were two other counts similar to the first.—The defendant pleaded the general issue.

At the trial, before *Gurney, B.*, at the *Worcester Summer Assizes*, 1833, it appeared that the way claimed was from a wharf in a close called *Cliff Meadow*, which adjoined the river *Severn*, through a meadow called *Eacham Meadow*, over a close called the *Acre*, where the obstruction took place, into a public highway; that the *Cliff* and *Eacham Meadow* were, in the year 1805, demised by the then Bishop of *Worcester*, to a Mr. Alderman *Davis*, for three lives. In the year 1809, a person of the name of *Roberts*, under whom the plaintiff claimed, purchased the leasehold interest in both the meadows from *Davis*, and established a large brickwork in *Cliff Meadow*. He then made an opening or carriage road out of *Cliff Meadow* into *Eacham Meadow*, and by that road carried the bricks through the piece called the *Acre* into the highway. At that time the *Acre*, now the property of the defendant, belonged to a person named *Dallow*, and he, in the month of *April*, 1811, erected a gate in the *Acre* to prevent *Roberts* from carrying bricks from the *Cliff Meadow* through the *Acre*, and locked up the gate; *Roberts* broke

the gate down, and he and the plaintiff who claimed under him continued to carry bricks without interruption until April, 1833, when the defendant, who had purchased Dallow's interest in the *Acre*, put up a gate across the road, and locked it up, and this action was brought for that obstruction. It appeared that when *Roberts* first purchased *Davis's* interest in the *Eacham* and *Cliff Meadows*, there was a road through the *Acre* to the *Eacham Meadow*, but no communication between the *Eacham* and the *Cliff Meadow*; but the road to the latter was by a place called *Grimley Stile*; and the defendant contended that the plaintiff had a right to use the road through the *Acre* to the *Eacham Meadow* only, and had no right to use it to the *Cliff Meadow*. The plaintiff on the contrary insisted that he had acquired a right of way to the *Cliff Meadow* by uninterrupted enjoyment for more than twenty years. The plaintiff obtained a verdict with 5*l.* damages; the jury finding that there had not been any grant of a right of way by the bishop, but that the plaintiff and *Roberts* had actually enjoyed the way without interruption for more than twenty years. The learned Judge gave the defendant leave to move to enter a nonsuit; and, in *Michaelmas* Term last, *R. V. Richards* obtained a rule accordingly on two grounds:—*First*, that the right of way was not made out by the evidence; and, *secondly*, that it was not properly described in the declaration.

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Ludlow, Serjt., and *Whatley* shewed cause.—The plaintiff acquired a right to the way in question by the uninterrupted enjoyment for twenty years, and, although the bishop as the reversioner may not be barred, the right is good as against the lessee. By the 2 & 3 Will. 4, c. 71, s. 2, it is enacted that “no claim which may be lawfully made at the common law to any way, &c. to be enjoyed or derived, upon, over, or from any land of the king, &c., or being the property of any ecclesiastical or lay person or

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body corporate, when such way shall have been actually enjoyed by any person claiming a right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by shewing that such way was first enjoyed at any time prior to such period of twenty years; but that nevertheless such claim may be defeated in any other way in which the same is now liable to be defeated;" so that the right of way acquired by user is saved out of the operation of that act. Here, it is not necessary to contend that the bishop would be barred, because he might say that he was not bound by the act of his lessee. That question would only arise at the expiration of the term when the bishop came into possession. It was observed by Mr. Baron *Bayley*, when this rule was moved for, that the user during the term might bind the party in possession, though not the reversioner. But the defendant cannot set up, that the right of way claimed is not good as against the reversioner. Here, as against the defendant and the person under whom he claimed, there was an uninterrupted adverse enjoyment of this way for more than twenty years, and the statute in such cases gives the right absolutely.

The second question is, whether this right of way is properly stated in the declaration. It is submitted that it clearly is. In all the counts the plaintiff claims the right of way by reason of his possession of the land. The right is connected with the possession, and though not strictly appertaining it is sufficiently so to support the counts. In Mr. Serjt. *Williams's* note to *Coryton v. Lithebye* (a), he says, that, in an action for disturbance of a way, it is sufficient to declare that the plaintiff was possessed of and in an ancient messuage, called *C.*, by reason whereof he had and ought to have a way through and over the defendant's land; and that the

defendant stopped it up and obstructed the plaintiff in the use of it. (They also cited *Barlow v. Rhodes* (*a*), and *Whalley v. Tompson* (*b*).) But even if it be wrongly laid, that is ground for arresting the judgment and not for a nonsuit.

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R. V. Richards and *Whateley, contrà*.—The land, over which this way is claimed, being held under a lease for lives under the see of Worcester, it is quite clear that, before the recent statute, user would not have created a right against the bishop as the reversioner. Independently of the late statute, the user of a way for twenty years would not have given a right even as against a lay reversioner, if it took place during the occupation of a tenant. If user were to be held conclusive as against the lessee, these ecclesiastical leases being generally for a long term, it would very often be impossible to shew how or when the way came first to be used, and such user might so become a bar against the bishop. A grant of way could not in a case of this kind be presumed. In *Barker v. Richardson* (*c*), where lights had been enjoyed for more than twenty years contiguous to land, which within that period had been glebe land, but was conveyed to a purchaser under the 55 Geo. 3, c. 147; it was held that no action would lie against such purchaser for building so as to obstruct the lights; inasmuch as the rector, who was tenant for life, could not grant the easement; and therefore no valid grant could be presumed. Lord *Tenterden* there says: “Admitting that twenty years’ uninterrupted possession of an easement is generally sufficient to raise the presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor.” And in *Runcorn v. Doe* (*d*), it was held that an adverse possession of twenty

(*a*) 1 C. & M. 439.

(*c*) 4 B. & Ald. 579.

(*b*) 1 B. & P. 371.

(*d*) 5 B. & C. 696.

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the same incumbent who submitted to such possession.

On the true construction of the recent act the defendant is entitled to use any argument which might hereafter avail the bishop. *Secondly*, the declaration is insufficient. The first count lays the way as appurtenant to the plaintiff's wharf and premises, but it is not appurtenant. [Parke, B.—It is appurtenant at the time of the injury of which the plaintiff complains. There is no difficulty about the declaration. That is sufficient. We must take time to consider the point as to the recent statute, as that is a question of considerable importance.]

Cur. adv. vult.

On a subsequent day in this term, the judgment of the Court was delivered by—

PARKE, B.—This was an action on the case for obstructing a way to the plaintiff's wharf, which was tried before my Brother *Gurney* at the last *Summer Assizes* at *Worcester*, when a verdict passed for the plaintiff, with liberty to move to enter a nonsuit on two grounds—*first*, that the plaintiff's title to the right of way was not made out by the evidence; and, *secondly*, that it was not properly described in the declaration. On shewing cause, the second objection was disposed of by the Court; and the only point now to be considered is, whether the right of way was established.

The way claimed was from a wharf in a close called *Cliff Meadow*, through *Eacham Meadow*, over the *locus in quo* called the *Acre*, where the obstruction took place, into a public highway. *Cliff* and *Eacham Meadows* were held under the Bishop of *Worcester*, by a lease for three lives, granted in 1805 to Alderman *Davis*. In 1809, *Roberts* purchased the leasehold interest from *Davis*, and began to make bricks in *Cliff Meadow*, and carried them through

Eacham Meadow and the *Acre* into the highway. In 1811, *Dallow*, the then occupier of the *Acre*, and the assignee of a lease for four lives under the Bishop of the close called the *Acre*, put up a gate to obstruct *Roberts* in carrying bricks. *Roberts* broke it down; and he and the plaintiff, who claimed under him, continued to carry bricks over the *Acre* without interruption for more than twenty years, when the defendant claiming as assignee of the Bishop's lease under *Dallow* obstructed the way, and for that obstruction the action was brought. No proof was given on either side that either of the original leases had been surrendered; and, therefore, the case must be considered as if both had continued to the time of the obstruction. The jury found—*first*, that they would not presume any grant of right of way by the bishop; and, *secondly*, that the plaintiff and *Roberts* had actually enjoyed the way without interruption for more than twenty years; and the only question is, whether such an enjoyment gives to the plaintiff a right of way over the defendant's close, so as to enable him to maintain this action. And this depends upon the construction of the act of the 2 & 3 Will. 4, c. 71, and particularly section 2.

For a series of years, prior to the passing of this act, Judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years by analogy to the Statute of Limitations. Such presumptions did not always proceed on a belief that the thing presumed had actually taken place; but, as is properly said by Mr. Starkie in his excellent *Treatise on Evidence*, Vol. 2, p. 669, "a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation;" and though in theory it was presumptive evidence, in practice and effect it was a bar. And that learn-

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ed author observes, that so heavy a tax on the consciences and good sense of juries, which they were called on to incur for the sake of administering substantial justice, ought to be removed by the legislature. The act in question is intended to accomplish this object, by shortening in effect the period of prescription, and making that possession a *bar* or title of itself, which was so before only by the intervention of a jury.

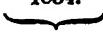
The title of the act is, "For shortening the Time of Prescription in certain Cases." And it recites, that the expression, "time immemorial," or "time whereof the memory of man runneth not to the contrary," is now by the law of *England* in many cases considered to include and denote the whole period of time from the reign of King *Richard* the First, whereby the title to matters which have been long enjoyed is sometimes defeated, by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice. It then proceeds to enact in the second section, that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived, upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of *Lancaster*, or of the Duchy of *Cornwall*, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way, by which the same is now liable to be defeated; and where such way or other

matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

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In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so "as of right," for that is the form in which by section 5 such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing *grant*. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed, "as of right." For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed "as of right" the easement, but the soil itself. So it must have been enjoyed without *interruption*. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear; and this enjoyment of twenty years, having been uninterrupted, and not defeated

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But if the enjoyment take place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect according to the true meaning of the statute? Will it be good to give a right against the See, and those claiming under it by a new lease; or only as against the termor and his assigns during the continuance of the term; or will it be altogether invalid?

In the first place, it is quite clear that no right is gained against the bishop; whatever construction is put on the 7th section, it admits of no doubt under the 8th. This section provides, "That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof." It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the Bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the Bishop, it certainly must from the shorter. Therefore, there is no doubt but that this possession of twenty years gives no title as against the bishop, and cannot affect the right of the See.

The important question is, whether this enjoyment, as it cannot give a title against all persons having estates

in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the See. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor, in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is "for the shortening the time of *prescription*;" and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant. This view of the case derives confirmation from the 7th section, which provides as follows:—"That the time during which any person, otherwise capable of resisting any claim to any of the matters

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Exch. of Pleas, before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee: in order to do that, there must be that period of enjoyment *against* an owner of the fee. The conclusion, therefore, to which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as section 6 forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course, nothing that has been said by the Court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking the possession into consideration, with *other circumstances*, as evidence of a grant, which they may still find to have been made, if they are satisfied

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that it *was made in point of fact*. We are therefore of *Exch. of Pleas,*
opinion, that, in the present case, the plaintiff is not en- *1834.*
titled to recover, but that a nonsuit must be entered.

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Rule absolute.

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ACTION on the case.—The first count of the declaration stated, that, before the commencement of the grievances, &c., to wit, on the 16th of *June*, 1832, there issued out of the Court of our said Lord the now King, before the Barons of his *Exchequer* at *Westminster*, in the county of *Middlesex*, a certain writ of our said Lord the King, called a *subpoena ad testificandum*, directed to the said *T. Stokes* and one *John Doe*, by which said writ our said Lord the King commanded them and every of them, that all other things set aside, and ceasing every excuse, they and every of them should be and appear in their proper persons, before his Majesty's Justices assigned to take the Assizes at *Bristol*, in and for the city of *Bristol*, on *Saturday* the 18th of *August*, then next coming, &c., to testify &c., in a certain action &c.; and that afterwards, and before &c., to wit, on the 16th day of *August*, in the year aforesaid, the said *Thomas Stokes*, then residing in the island of *Guernsey*, being the place of his abode, was duly served with a copy of the said writ of *subpoena ad testificandum*, and that in obedience thereto he, the said *T. Stokes*, left his said place of abode, and attended in his proper person before his said Majesty's Justices assigned to take the Assizes at *Bristol*, in and for the city of *Bristol*, on *Saturday* the 18th of *August*, in the year aforesaid, and so from day to day until the cause was tried, to testify the truth according to his knowledge in the said action so depending as aforesaid; and which said

A. being indebted to *B.*, *B.* sued out bailable process, which he delivered to the sheriff to execute, and the sheriff arrested *A.* whilst he was attending a trial as a witness under a *subpoena*: —*Held*, that an action on the case was not maintainable by *A.* against *B.* for procuring *A.* to be illegally arrested, it not being shewn that *B.* had any knowledge that *A.* was attending as a witness when he delivered the writ to the sheriff to be executed.

The office of side clerk of the Court of *Exchequer* still exists, notwithstanding the 1 *Will.* 4, c. 70, and 2 & 3 *Will.* 4, c. 110, and side clerks are still entitled to arrest attorneys of the other Courts by *copias* of privilege.

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action afterwards, to wit, on the 22nd day of *August*, in the year aforesaid, was tried by a jury of the country between the parties aforesaid, of the plea aforesaid, to wit, at *London* aforesaid; yet the said *Thomas White*, well knowing the premises aforesaid, but contriving, &c. to injure the said *Thomas Stokes*, and to deprive him of the benefit of his privilege as a witness attending the trial of the said action, and to put him to great trouble, charges, and expenses of his monies, afterwards, and before a reasonable time had elapsed for the return of the said *Thomas Stokes* from *Bristol* aforesaid to his said place of abode in the island of *Guernsey* aforesaid, to wit, on the twenty-third day of *August*, in the year aforesaid, at &c., wrongfully and unjustly caused and procured the said *Thomas Stokes* to be, and the said *Thomas Stokes* was then and there arrested by his body, upon and by virtue of a certain writ of our said Lord the King, called an *alias capias* of privilege, before then issued out of the said Court of our said Lord the King, before the Barons of his said *Exchequer*, at *Westminster*, directed to the sheriffs of *Bristol*, by which said writ our said Lord the King commanded the said sheriffs, as before he had commanded them, that they should omit not, by reason of any liberty of their city, &c., but that they should enter the same, and take the said *Thomas Stokes* and *John Doe* wheresoever &c., and them safely keep, so that &c., to answer the said *Thomas White*, one of the side clerks of *Stephen Richards, Esq.*, one of the sworn attorneys of the Office of Pleas in his said Majesty's said *Exchequer*, of a plea of trespass, and that the said sheriffs should have there that writ; and which said last-mentioned writ was then and there marked and indorsed for bail for 7*l.*; and the said *Thomas White* then and there wrongfully and unjustly caused and procured the said *Thomas Stokes* to be imprisoned, and kept and detained in prison upon the said arrest, for a long space of time, to wit, for the space of three days then next fol-

l owing, and until the said *Thomas Stokes*, in order to procure his release and discharge from the said imprisonment, was forced and obliged to and did procure certain persons, to wit, *J. P. H.* and *W. H. B.*, to become bail for the appearance of him the said *Thomas Stokes*, in the said Court, &c., before the Barons, &c., to answer the said *Thomas Stokes* according to the exigency of the said writ; and upon that occasion the said *Thomas Stokes* and the said *J. P. H.* and *W. H. B.* were forced and obliged and did enter into a certain bond and obligation, in a large sum of money, to wit, 148*l. 6s.* of &c., for the purpose aforesaid; by means of which said several premises the said *Thomas Stokes* not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, but was also thereby put to great trouble, charges, and expenses of his monies in and about the procuring of the said bail and entering into the said bail-bond, and obtaining his release and discharge from the said imprisonment, and in and about the applying for and obtaining a certain order of the Hon. Sir *J. Littledale*, Knt., one of the Justices of his said Majesty's Court of *King's Bench*, for the discharge of the said *Thomas Stokes* out of the custody of the said sheriffs of *Bristol*, and for the delivery up of the said bail-bond to be cancelled; and the said *Thomas Stokes* hath been and is, by means of the premises and otherwise, greatly injured, &c.—The second count stated that before &c. the said *Thomas Stokes*, then residing in the island of *Guernsey* aforesaid, had been and was duly subpoenaed to attend, and did accordingly attend, in his proper person before his said Majesty's Justices assigned to take the Assizes of *Bristol* aforesaid, in and for the said city of *Bristol*, on &c., and so from day to day until the cause was tried, to testify the truth, according to his knowledge, in a certain action, &c. (as described in the writ of *subpœna*), and which said last-mentioned action, afterwards, to wit, on &c., was tried &c.; yet &c., nearly as in the first count, only more general, and

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Exch. of Pleas, stating the *alias capias* of privilege to be at the suit of the
1834. said *Thomas White*, without describing him as a side clerk.

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".
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—The third count stated that the said *Thomas Stokes*, before and at the time of the committing of the grievances &c., was and from thence hitherto hath been one of the attorneys of the Court of our said Lord the now King, before the King himself at *Westminster*; and the said *Thomas Stokes* during all that time hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the same Court, for divers liege subjects of our said Lord the King, as their attorney; and the said *Thomas Stokes*, and all other the attorneys of the said last-mentioned Court, prosecuting and defending suits and pleas therein for their clients, before and at the time of committing the said last-mentioned grievance, ought by an ancient and laudable custom, from time immemorial used and approved of, according to the laws and customs of this realm, and the liberties and privileges of the said last-mentioned Court, to have been and still of right ought to be free and exempt from being arrested, and holden to special bail, in any personal action at the suit of any other person or persons, to wit, at &c., nevertheless &c., as in the first count.—The fourth count stated, that the plaintiff was an attorney of the Court of *King's Bench*, and alleged that whilst he the plaintiff was such an attorney, the defendant caused him to be arrested by a *capias* of privilege.

The defendant pleaded the general issue. At the trial before Lord *Lyndhurst*, C. B., at the *London* Sittings after last *Trinity* Term, it was admitted that the plaintiff was indebted to the defendant in the sum of 74*l.* 3*s.* for business done in the character of the plaintiff's town agent. It was proved that the plaintiff was an attorney of the Court of *King's Bench*, and that the defendant was a clerk in court on the plea side of the Court of *Exchequer*, and that such clerks in court had always possessed and exercised the privilege of holding to bail attorneys of the

other Courts. It appeared also, that, on the 18th of April 1832, a *capias* of privilege was issued, indorsed for bail for 7*l.*, but that writ was not executed in consequence of the plaintiff's having gone to *Guernsey*. That on the 22nd of August, 1832, an *alias capias* of privilege was issued, and was lodged with the sheriffs of *Bristol* on the 23rd. That the plaintiff attended the *Bristol Assizes* under a *subpoena*; that the cause in which he was attending as a witness was over by eleven o'clock on the morning of the 22nd; and that he was arrested at the suit of the defendant on the 23rd, between twelve and one o'clock. That he was in custody altogether twenty-six hours, when he found bail to the sheriff and was discharged. It was further proved by the clerk of the plaintiff's attorney, that a summons was afterwards taken out in *London*, and served at the defendant's chambers, calling on him to shew cause, before a Judge at chambers, why the bail-bond should not be delivered up to be cancelled, on the ground that the plaintiff was protected by his *subpoena*; that this summons was attended by the defendant's clerk on his behalf, and that he strenuously opposed the discharge; but that Mr. Justice *Littledale* made an order that the bail-bond should be cancelled.

The plaintiff obtained a verdict with 10*l.* damages, the learned Chief Baron reserving leave to the defendant to move to enter a nonsuit.

Talfourd, Serjt., in *Michaelmas Term* last, obtained a rule accordingly, against which—

The *Attorney-General* and *Kelly* shewed cause.—The first question is, whether an action lies at the suit of a person arrested and imprisoned, whilst he is privileged and attending as a witness under a writ of *subpoena*; and if so, whether an action lies against the present defendant, under the circumstances of this case. [Lord *Lyndhurst*, C. B.—Assuming that the defendant knew that the plaintiff would,

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Exch. of Pleas, attend the Assizes, and that it was likely that he would be
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 to be found there, all that the plaintiff did was to deliver
 a writ to the sheriff, and to leave it to his discretion to
 execute it properly. Does the act of the sheriff in executing
 the writ improperly subject the plaintiff to an action?
Parke, B.—Might not the plaintiff's remaining in *Bristol* so long after the trial have induced the sheriff to think that he would be justified in executing the writ and arresting the plaintiff? Whatever might be the case as against the sheriff, can the defendant be liable to an action under such circumstances?] Supposing that to be a matter of doubt on the original imprisonment, at all events an action lies for having kept and detained the plaintiff in prison, with a full knowledge of all the facts. [*Parke, B.*—The declaration is for arresting the plaintiff and keeping him in custody until he gave bail. You cannot say he is imprisoned when he is out upon bail.] It is submitted that an action on the case is maintainable. Where a party is arrested whilst he is attending as a witness under a *subpaena*, it is a breach of the law, operating injuriously on his property as well as his person, for which an action lies. Against this doctrine two cases were relied upon at the trial. The first case was *Cameron v. Lightfoot* (*a*), in which it was held that an action of trespass would not lie where the party was imprisoned under lawful process; but the ground of that decision was, that it was an action of trespass, and that trespass would not lie where the process was lawful. There is no authority, nor any case there cited, to shew that an action on the case is not maintainable. *Tarlton v. Fisher* (*b*) merely decides the same point, that *trespass* is not maintainable. Lord *Mansfield* there says, “This is a direct action of trespass, *vi et armis*, and not *on the case*; and there is this distinction between them, which ought always to be attended to: in *trespass*, innocence of intention is no excuse; in *case* the whole turns upon it—malice or the *quo animo* is the gist

of the action." [Lord *Lyndhurst*, C. B.—Lord *Mansfield* ^{*Exch. of Pleas,*} at the conclusion of his judgment, after saying that he was clear trespass would not lie against the officers, uses these words, "whether, if the defendants had done any thing oppressive, with full notice of all the circumstances, an action on the case might be maintained, would be another question." *Parke*, B.—There certainly is not full notice of all the circumstances here.] There was an affirmation of the arrest by the defendant afterwards, in opposing the summons when he had full knowledge of all the circumstances. [Parke, B.—Affirmance will not do. You must shew full knowledge on the part of the defendant at the time of the act being done, and that he ordered it to be done.] Here, the declaration alleges, not only that the defendant unjustly caused and procured the plaintiff to be imprisoned, but that he kept and detained him in prison upon the said arrest for the space of three days. [Parke, B.—The plaintiff did not prove that the defendant kept and detained the plaintiff in prison with a knowledge of all the facts. You cannot contend that an action on the case lies, unless there be an act done with full knowledge of the circumstances.] If so, the question is, whether keeping him in prison, or under the liability of a bail-bond, is not sufficient? [Parke, B.—That you have not declared on.] If a party who could interpose and give a discharge does not do so, surely it is an affirmation of the keeping in prison. [Alderson, B.—Take the case where a party is arrested by the sheriff improperly, and the plaintiff in the action says, "I will take the opinion of the Judge;" would he thereby subject himself to an action? According to your argument, a man could not, *bond fide*, try that question. Parke, B.—He has a right to take the opinion of the Judge. Lord *Lyndhurst*, C. B.—This is not the act of the party, nor done with the knowledge of the party, nor do the facts warrant us in saying that it was an affirmation by the party.]

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There is another question as to the privilege from arrest; the plaintiff in this case was an attorney, and therefore privileged from arrest, and there was no want of knowledge in the defendant of that fact. The case of *Walker v. Rushbury* (*a*) is relied on as an authority for the arrest; but that was not the case of an action, but was merely a decision of this Court, on motion only, and took place before the passing of the 1 Will. 4, c. 70. Here the action and the arrest were both subsequent to the passing of that act. [Parke, B.—Surely that point is quite settled, that there is no privilege against privilege.] That as a general proposition is incorrect. The defendant had a right to sue, but no right to arrest. The right to arrest is claimed exclusively by the sworn clerks of this Court. In *Beck v. Lewin* (*b*), where an attorney of the Court of *Common Pleas* was arrested on an attachment of privilege at the suit of an attorney of the *King's Bench*, the latter Court ordered the bail-bond to be delivered up to be cancelled. [Lord Lyndhurst, C. B.—The case of *Bowyer v. Hoskins* (*c*) was decided on the practice of this Court; and it was there held, that attorneys and clerks of this Court may sue and arrest attorneys of the other Courts by *capias* of privilege. The distinction in this Court is founded on their being clerks in Court.] By the new act their duties are abolished, and they have now no duties to perform, as their former duties are transferred to other officers; and it is submitted that the moment their duties ceased, their privileges ceased also. [Lord Lyndhurst, C. B.—They were entitled to sue attorneys of the other Courts in this Court; and the act has not taken away their privilege. The side clerks were to do some of the duties of the sworn clerks in their own causes. The act does not abolish side clerks, but says that attorneys of the other Courts may practise there without being obliged to employ any clerk in Court.]

(*a*) 9 Price, 16.

(*b*) 1 Tidd's Prac. 219, 7th ed.

(*c*) 1 Y. & J. 199.

If that act had not the effect of abolishing the office of side clerk, yet, by the 2 & 3 Will. 4, c. 110, s. 3, the old offices of the Court of *Exchequer* are abolished, and the act appoints five principal officers to perform separate duties; and says that no person holding any of the said offices, or being a clerk or assistant to any of the said officers, shall practise as an attorney, or agent of an attorney or solicitor, in any Court of law or equity, either separately or in partnership with any other, during such time as he shall hold such office, or act as such assistant or clerk. The side clerks could only act in the name of the sworn clerks; and the act of the 2 & 3 Will. 4, c. 110, having provided that the sworn clerks shall no longer practise as attorneys, how can the side clerks any longer practise? It is contended that they can no longer do so, and that when the old offices were abolished, and the duties of the sworn clerks were transferred to the new officers, the privileges of the side clerks entirely ceased.

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Lord LYNDHURST, C. B.—There is nothing in the act of the 2 & 3 Will. 4, c. 110, to take away the privilege of the side clerks. That act does not abolish side clerks. It merely says, that, in consequence of the opening of the Court, the business had greatly increased, and that the same, since the passing of the 1 Will. 4, c. 70, had been conducted and performed by the said deputy clerk of the pleas and the said four sworn clerks, but without any obligation on them to perform those duties; and it then provides by whom the duties are to be done. The side clerks still exist, and their privileges exist. It is not necessary that a side clerk should be entered as an attorney in the Court of *Exchequer*, to enable him to practise there. The side clerks still continue to act as side clerks without admission. The act of the 1 Will. 4, c. 70, provides for the admission of the attorneys of the other Courts, but says nothing as to the side clerks being admitted; and so the side clerks must either be abolished altogether, or exist with

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their former privilege. I always considered that the sworn clerks still exist, notwithstanding the act. The act does not say that they shall no longer exist, but merely points out the duties they are to perform.

PARKE, B.—The 10th section of the 1 Will. 4, c. 70, does not say that attorneys of the other Courts *and side clerks* may practise, but says attorneys of the other Courts only. Then, as a right to practise is not given to them specially, they must continue to have a right to practise as side clerks, or else they would be prevented from practising altogether, which never could have been intended.

The other Barons concurred.

Rule absolute.

HEWITT *v.* WILLIAM MELTON.

A defendant's attorney requested a plaintiff's attorney to forbear charging the defendant in execution until next term, and falsely represented to the plaintiff's attorney that he had the authority of the defendant to consent that he should not be charged in execution until the next term; and the defendant's attorney gave a consent in writing to that effect, which omitted to state that the proceedings were stayed at the request of the defendant, according to the rule Hil. 26 & 27 Geo. 3. The plaintiff's attorney forbore to charge the defendant in execution until the next term, and the defendant was discharged for want of having been so charged, on the ground that the consent did not state that the proceedings were stayed at the request of the defendant. In an action brought by the plaintiff against the defendant's attorney for the false representation, as having occasioned the damage:—*Held*, that the action was not maintainable.

CASE.—The first count of the declaration was as follows:—For that whereas the plaintiff, heretofore &c., before the Barons of his Majesty's *Exchequer* at *Westminster*, in a certain action then depending in the said Court, at the suit of the plaintiff, against one *Thomas Berwick Melton*, recovered against the said *T. B. Melton* a judgment for a certain sum of money, to wit, the sum of 1000*l.*, for damages and costs, as by the said judgment recovered in the said Court of our said lord the king, before the Barons &c., more fully appears, and which said judgment, before and at the time of committing the grievances by the defendant hereinafter next mentioned, was and still is in full force &c. And whereas, after the re-

covering the judgment aforesaid, and whilst the same was in full force &c., to wit, on &c., in *Michaelmas Term*, in the third year of the reign of our said lord the king, the said *T. B. Melton* was rendered to the custody of the Warden of his Majesty's prison of the *Fleet* in discharge of his bail, at the suit of the plaintiff in the said suit, in the said Court of *Exchequer*, and, at the time of committing the grievances by the defendant in this suit as hereinafter next mentioned, was a prisoner in the custody of the said Warden of his Majesty's prison of the *Fleet*, at the suit of the plaintiff in the said suit in this Court of *Exchequer*; and the said *T. B. Melton*, having been so rendered to and so being a prisoner in the custody of the said Warden of his Majesty's prison of the *Fleet* as aforesaid, it became and was essential and necessary, by and according to the course and practice of his said Majesty's said Court of *Exchequer*, for the plaintiff to cause the said *T. B. Melton* to be duly charged in execution upon the said judgment, before the expiration of a certain time, to wit, before the end and expiration of *Hilary Term* then next ensuing, to wit, *Hilary Term* in the third year aforesaid; and the plaintiff, by *Richard Hill*, who was then and there his attorney in the said suit in the said Court of *Exchequer*, was minded and desirous, and was about to so duly charge, and but for the false, fraudulent, and deceitful representations of the said *W. Melton*, hereinafter next mentioned, would have so duly charged the said *T. B. Melton* in execution, at the suit of him the plaintiff, upon the said judgment; of all which premises the said *W. Melton*, the defendant in this suit, before the committing the grievances hereinafter next mentioned, to wit, in the county of *Middlesex* aforesaid, had notice. And whereas afterwards, and after the recovering of the said judgment, and whilst the same was in full force, and after the said *T. B. Melton* had been so rendered to and whilst he was a prisoner in the custody of the said Warden of his Majesty's prison of the *Fleet* as

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said *T. B. Melton* in execution upon the said judgment, and before the expiration of the necessary time for so doing, and before the expiration of the said *Hilary Term*, in the third year aforesaid, to wit, on the 25th day of *January*, in the year of our Lord, 1833, the said 25th day of *January*, in the year 1833 aforesaid, then and there being a day in and before the end and expiration of the said *Hilary Term*, in the third year aforesaid, to wit, in the county aforesaid, the said *W. Melton*, the defendant in this suit, then being one of the attorneys of his Majesty's said Court of *Exchequer*, and also the attorney of and for the said *T. B. Melton* in the said suit, applied to and requested the said *Richard Hill*, as being the attorney of and for him the said *John Hewitt*, the plaintiff in the said suit, and also the plaintiff in this suit, for the said *John Hewitt*, not to charge, and that he would not charge the said *T. B. Melton* in execution in the said then *Hilary Term*, in the third year aforesaid, nor until the then next *Easter Term*; and the plaintiff further says, that the said *William Melton* contriving, and fraudulently, wickedly, and deceitfully intending to deprive the plaintiff of the benefit and fruits of his said judgment against the said *T. B. Melton*, and the means of recovering and enforcing payment of the said damages and costs so recovered by the plaintiff against the said *T. B. Melton*, by the said judgment as aforesaid, then and there, to wit, on the said 25th day of *January*, in the year 1833 aforesaid, in the county aforesaid, falsely, fraudulently, wickedly, and deceitfully pretended, represented, and asserted to the said *R. Hill*, so then and there being the attorney of and for the plaintiff in the said suit, in which the plaintiff had so recovered the said judgment as aforesaid, that he the said *William Melton* was then and there authorized by the said *T. B. Melton* to make such application and request to the said *Richard Hill*, so then and there being the attorney of and for the

plaintiff in the said last-mentioned suit; and that he the said *William Melton* was then and there authorized and empowered by the said *T. B. Melton* to sign and deliver to the said *Richard Hill*, so then and there being the attorney of and for the plaintiff in the said last-mentioned suit, a certain undertaking in writing, then and there signed and delivered by the said *William Melton*, as the attorney of and for the said *T. B. Melton* in the said last-mentioned suit, to the said *Richard Hill*, as the attorney of and for the plaintiff in the said last-mentioned suit, whereby he the said *William Melton*, so being the attorney of and for the said *T. B. Melton* in the said suit, consented that the plaintiff should have until the then next *Easter Term*, to charge the said *T. B. Melton* in execution, at the suit of the plaintiff, upon the said last-mentioned judgment, and to take no advantage of his the said *T. B. Melton* not being charged in execution in the said then *Hilary Term*, it being then and there agreed that the said plaintiff should have until the then next *Easter Term* to do it in, meaning to charge the said *T. B. Melton* in execution upon the said judgment; and the plaintiff further says, that thereupon the said *Richard Hill*, so then and there being the attorney of and for the plaintiff in the said suit, considering in the said assertions and representations of the said *William Melton*, and believing the same to be true, and not knowing the contrary thereof, did then and there take and accept the said consent and undertaking in writing, and did forbear and omit to charge the said *T. B. Melton* in execution, at the suit of the plaintiff upon the said judgment, on or before the end or expiration of the said *Hilary Term* in the third year aforesaid, or within a due and proper time in that behalf, as he could and might and otherwise would have done; whereas, in truth and in fact, the said *T. B. Melton* was not at the time he made such application and request as aforesaid to the said *Richard Hill*, so being the attorney of and for the said plaintiff in

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the said suit, and made such assertions and representations to the said *Richard Hill* as aforesaid, or afterwards, authorized or empowered by the said *T. B. Melton* to make such request and application; and whereas in truth and in fact the said *William Melton* was not at the time he so signed and delivered to the said *Richard Hill*, so being the attorney of and for the plaintiff in the said suit as aforesaid, the said undertaking or consent in writing as aforesaid, and made such assertion and representation in that behalf as aforesaid, or afterwards, authorized or empowered by the said *T. B. Melton* to sign or deliver the same to the said *Richard Hill*, so being the attorney of and for the plaintiff in the suit aforesaid, or to the plaintiff in the suit aforesaid, or to give any other valid or sufficient undertaking for the plaintiff to have until the said then next *Easter Term* to charge the said *T. B. Melton* in execution upon the said judgment, and to take no advantage of the said *T. B. Melton* not being charged in execution in the said then *Hilary Term*; and the plaintiff further says, that the said *T. B. Melton* took advantage of the plaintiff not having charged or caused him the said *T. B. Melton* to be charged in execution upon the said judgment before the end and expiration of the said *Hilary Term*, and afterwards, to wit, on the 17th day of *April*, in *Easter Term*, in the third year aforesaid, made and caused to be made application to the said Court of *Exchequer* to be discharged out of custody at the suit of the plaintiff in the said suit, for and by reason of the said plaintiff in the said suit not having charged or caused to be charged him the said *T. B. Melton* in execution upon the said judgment before the end and expiration of the said then last *Hilary Term*, as according to the course and practice of the said Court he ought to have done; and the said *T. B. Melton* was upon and in consequence of such application afterwards, to wit, on the 2nd day of *May* in the same *Easter Term*, in the third year aforesaid, by and in pursuance of a certain

rule or order of the said Court, made in the said Court on the 2nd day of *May* in *Easter Term*, in the third year aforesaid, discharged out of custody of the said Warden of the *Fleet*, at the suit of the plaintiff, in the suit aforesaid, for and by reason and on account of the plaintiff not having charged or caused to be charged the said *T. B. Melton* in execution upon the said judgment, within the said time in that behalf aforesaid, and which the said *Richard Hill*, so being the attorney of and for the plaintiff in the said suit, forbore and omitted to do, by, from, and in consequence of the said false, fraudulent, and deceitful representations and assertions of the said *William Melton*, and the belief and confidence of him the said *Richard Hill* in the same; and by means of the premises, the plaintiff lost all benefit and advantage of and from the said judgment so recovered by him against the said *T. B. Melton* as aforesaid, and the means of obtaining or recovering payment or satisfaction of the damages and costs aforesaid, or any part thereof, to wit, in the county aforesaid. The second count was similar.—Plea, the general issue.

At the trial, before *Vaughan*, B., at the *Middlesex* Sittings in *Trinity Term*, 1834, the following appeared to be the facts of the case:—The plaintiff had recovered a judgment in an action against one *Thomas Berwick Melton*, who was the father of the defendant, and *T. B. Melton* being in the custody of the Warden of the *Fleet*, it became necessary to charge him in execution in the course of *Hilary Term*, 1833. On the 25th of *January*, the defendant, who was his father's attorney in the action, was in the office of Mr. *Hill*, the plaintiff's attorney, and saw a *habeas corpus* which was prepared for the purpose of bringing up *T. B. Melton* to be charged in execution. The defendant, upon seeing the writ, observed, that it would expose his father, and bring in detainers, and requested that Mr. *Hill* would not charge the defendant until

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 and get the consent of his father to the proposed arrange-  
 ment, and he went out accordingly, as if for that purpose.  
 Upon his return, he represented that he had his father's  
 consent and authority, and he wrote out in Mr. *Hilts*'s  
 office the following memorandum and consent:—

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“I hereby consent that the plaintiff shall have until next term to charge the defendant in execution, and to take no advantage of his not being charged in execution this term, it being agreed that the plaintiff shall have until next *Easter* term to do it in.

“January 25, 1833.

“William Melton,  
 “Defendant's Attorney.”

The plaintiff's attorney, in consequence of this consent, forbore to charge *T. B. Melton* in execution, and an application was afterwards made at chambers for his discharge. It was sworn on the affidavits in support of the application, that the son, the present defendant, had no authority to give the undertaking, and that the father, *T. B. Melton*, did not know of it. The application was subsequently referred to the full Court, who in *Easter* Term, 1833, made the rule for his discharge absolute, on the ground that the consent did not express that the proceedings were stayed at the request of the defendant in the suit, according to the rule of *Hil. Term 26 & 27 Geo. 3 (a)*.

At the trial several objections were taken, and were reserved by the learned Judge, who gave the defendant leave to move for a nonsuit. A verdict having passed for the plaintiff—

(a) See *Hewitt v. Melton*, 1 C. & M. 579.

*Miller* obtained a rule for a nonsuit or new trial upon several of the objections taken at the trial, none of which it is necessary to state, except the one upon which the Court proceeded to give their judgment; which was, that the injury arose not from the false representation stated in the declaration, but from the informality of the document.

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*Mereweather*, Serjt., and *Platt*, now shewed cause.—It was on the faith of the false and fraudulent representation that the plaintiff's attorney did not proceed to charge *T. B. Melton* in execution. [*Gurney*, B.—The damage to you was, that the defendant was discharged; and that was owing not to the falsehood about the father's consent, but to the document being defective.] The ground of the discharge was the want of being charged in execution in due time, and that was occasioned by the false representation. Mr. *Hill* proved, that but for the false representation he should have proceeded to charge the defendant. The form of the document was immaterial; for, if it had been ever so valid, the defendant in that action would still have said that he was not bound, as he had given no authority. The validity of the document, therefore, does not come in question; *T. B. Melton* would have taken the same advantage, whether the consent had been according to the rule of Court or not, and the damage would have been just the same. The damage was the discharge; and the means of obtaining that discharge were procured by this defendant by making the fraudulent representation in question. [*Alderson*, B.—The ground for the discharge would have been just the same, whether the representation was true or false.] Still the damage would not have happened but for the false representation. Suppose the now defendant had come into Mr. *Hill's* office, and had said, I am not authorised to give any consent, but I will give one; it is clear that the undertaking would not have been accepted,

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and the damage would not in that case have happened. If the father had really given his consent, *non constat* that he would have been so dishonest as to have taken advantage of the not being charged in execution. [Lord Lyndhurst, C. B.—If the attorney's act bound the principal, is it not immaterial whether the representation as to the authority was true or false? If so, the injury has arisen solely from the informality of the document, in omitting to express that the proceedings were stayed at the request of the defendant in the suit, according to the mode pointed out by the rule of Court.] It was probably part of the fraud to omit the expression of the proceedings being stayed at the request of the defendant.

*Follett and Miller, contrà, were stopped by the Court.*

Lord LYNDHURST, C. B.—This is an action to recover damages alleged to have been occasioned by the act of the defendant; and, to maintain the action, it is necessary that the plaintiff should satisfy the Court that the damage mentioned arose from the cause stated in the declaration, that is, from the false representation of the defendant. Now, as he was the attorney for his father in the action, it was immaterial whether he had the express authority of his father on the occasion in question, as his act as such attorney was equally binding without such express authority. The damage arose not from the false representation, but from the informality of the document. That document was given in Mr. Hill's presence, and to that informality Hill was a party as well as the defendant.

BOLLAND, B.—I am of the same opinion. It has been contended, that the ground upon which these proceedings were stayed was the representation of the son that he had the authority of his father. But there was still something further to be done, as it was necessary that a proper

document should be prepared. Such a document was not prepared, but an informal one was taken; that informality, and not the false representation of the son, was the ground of the discharge.

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**ALDERSON, B.**—The gist of the present action is, that owing to the false representation of the son, damage has been sustained by the plaintiff. The damage does not however appear to have arisen from that false representation, for the father was not discharged on the ground of a want of authority in the son, but on the ground of the defect in the document itself.

**GURNEY, B.**—I concur in the opinion of the Court, though with great regret, as this appears to me to be a case of great fraud.

Rule absolute for a nonsuit.

### DICKENSON *v.* TEAGUE.

**ASSUMPSIT** on several bills of exchange. **Pleas**—*First*, the general issue; and, *secondly*, that the causes of action did not accrue within six years next before the commencement of the suit. Replication to the second plea, that the causes of action did accrue within six years next before the commencement of the suit.

At the trial before *Bolland, B.*, at the *London* Sittings after *Michaelmas* Term, it appeared that the first writ, by which the action was commenced, was issued on the 21st *May, 1832*, which was within six years from the time

A defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit; the plaintiff replied that the cause of action did arise within six years, &c.:—  
*Held*, that the plaintiff might prove a *quo minus* to

have been issued within the six years, and to have been continued down to the time of the defendant's appearance.

On the trial of an issue, whether the cause of action arose within six years next before the commencement of the suit, the plaintiff produced the roll on which the continuances appeared to have been regularly entered up. It appeared from the writs themselves, that the second writ, which was an *alias quo minus*, was tested on a day subsequent to the day of the teste of the first writ:—  
*Held*, that the roll being right, the Court could not look to any thing else to contradict it.

*Eccles. of Pleas,* when the cause of action accrued. The plaintiff produced the roll, on which continuances were regularly entered up. Four writs were produced, the first of which was issued on the 21st *May*, 1832, returnable on the 26th *May*, which was the first day of *Trinity Term*. The second writ, which was an *alias quo minus*, was tested on the 16th *June*, 1832, being the last day of *Trinity Term*, returnable on the first day of *Michaelmas Term*. The third writ was tested on the first day of *Michaelmas Term*, returnable on the first day of *Hilary Term*, on which day the last writ was tested, and upon that writ the defendant appeared. It was objected, that the first process was not regularly continued down so as to connect it with the declaration, because the second writ was not tested on the return of the first. The learned Judge overruled the objection, and gave the defendant leave to move to enter a nonsuit.

*Crowder* obtained a rule accordingly; and a cross rule was obtained by the plaintiff to amend the second writ, by making it conformable to the roll.

*D. Pollock, Kelly, and Wilson* now shewed cause against the rule for entering a nonsuit.—This rule was moved upon several grounds, but was granted merely on the point as to the Statute of Limitations. When the roll is looked at, all objection is removed; for on the roll every thing is right from the beginning to the end. The process appears on the roll to be regularly continued down to the time of the defendant's appearing. The supposed defect appears only in the writ, which cannot be used to contradict the roll. [*Parke, B.*—If the roll is right we can look at nothing else.] They were then stopped by the Court.

*Crowder*.—Under this replication the plaintiff could not give evidence of process sued out within the time.

He ought to have replied the *quo minus* specially. [Parke, B.—That objection ought to have been taken distinctly at the trial, for then the plaintiff might have proceeded to prove an acknowledgment within the time. The question is, whether you took the objection at the trial, that, under this replication, evidence of the writ could not be given. It is clear, that, under a general replication to a plea that the cause of action arose within six years from the exhibiting of the bill, the plaintiff cannot give evidence of process sued out before the exhibiting of the bill, but he is bound to reply the process. If he does not, but only takes issue on the plea, the only question is, whether there has been a promise or cause of action within the time. [The learned Baron then examined the pleadings.] I find that the plea is, that the cause of action did not accrue within six years next before the commencement of the writ, not before the exhibiting of the bill; that makes all the difference. If the defendant choose to plead that the cause of action did not accrue within six years before the commencement of the suit, the plaintiff may reply generally, and prove the writ which is the commencement of the suit; that was so decided in *Beardmore v. Rattenbury* (a).] That was the case of an original writ. When the defendant speaks of the commencement of the suit, he must be taken to mean the proper and usual commencement in point of law, that is *prima facie* the exhibiting the bill; and the plaintiff should shew by his replication if he intend to treat the process as the commencement. Here the first writ has not been properly connected with the action.

**PARKE, B.**—On the first point, it is quite clear that we must look at the record only; we must take it for granted that the roll is true, and cannot allow it to be contradicted.

(a) 5 Barn. & Ald. 452; 1 Dowl. & Ryl. 27.

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*Exch. of Pleas.*, On the other point, the general rule before the late  
statute (a) was, that it was in the option of the plaintiff  
whether he would treat the process, or the exhibiting of the  
bill, as the commencement of his suit. If the defendant  
pleaded, that the debt did not accrue within six years from  
the time of exhibiting the bill, then the plaintiff, if he in-  
tended to adopt the process as the beginning of his action,  
was bound to plead it; but if the defendant chose to plead  
generally that the cause of action did not accrue within  
six years from the commencement of the suit, the plaintiff  
could not properly reply process, but might reply generally  
that the cause of action did accrue within six years before  
the commencement of the suit, and give the process  
in evidence to shew what was the true commencement of  
the suit. The plaintiff in the present case had a right to  
say, that the *quo minus* was the commencement of the  
action. If the plea had been, "next before the exhibiting  
of the bill," it would have been different. There is no  
foundation for the objection, and the rule for a nonsuit  
must be discharged. The other rule for the amendment  
must also be discharged, and, as there was no necessity  
for that rule, it must be discharged with costs.

The rest of the Court concurring—

Both rules discharged.

(a) The Uniformity of Process Act, 2 Will.4, by which the writ of summons or *copias* is now always the commencement of any personal action. See *Alston v. Underhill*, 1 C. & M. 492.

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## EMERY v. DAY.

**A**SSUMPSIT for goods sold, work and labour, money had and received, and on an account stated, against the defendant as clerk of the trustees, named and appointed under a certain act of Parliament, made and passed in the 54 Geo. 3, intituled "An Act for repairing the road from *Potton*, in the county of *Bedford*, and *Gamingay*, in the county of *Cambridge*, to *Eynesbury*, in the county of *Huntingdon*. Pleas—the general issue, and the Statute of Limitations, that the defendant did not promise within six years. Replication—that he did promise within six years.

At the trial, before *Denman*, C.J., at the last *Leaf* Assizes for the county of *Cambridge*, it appeared that the plaintiff had entered into a contract in *October*, 1823, with the trustees of the *Eynesbury* road, to erect a toll-house, and that the work had been performed by him at the end of that year and the beginning of 1824. It was proved, that, in *May*, 1829, a meeting of the trustees was held, at which the trustees ordered the money to be raised and the tradesmen paid; but on the book which ought to have contained an entry of such order being called for and produced, it was found to contain no such order. The Lord Chief Justice nonsuited the plaintiff, and gave him leave to move to enter a verdict for the amount claimed. In *Easter Term*, *B. Andrews* obtained a rule accordingly.

*Kelly* shewed cause.—No promise or acknowledgment

trustees had a meeting, and verbally ordered that money should be raised, and the tradesmen paid:—*Held*, that the right of action accrued when the work was done, and not when the trustees were in funds; and that the Statute of Limitations was a bar, notwithstanding the order in 1829.

A local turnpike act enacted that all monies, &c. should be vested in the trustees, to be applied in the order and manner following:—First, in paying costs, charges, &c. in obtaining the act, &c. &c.; in the second place, in defraying the expenses of erecting or providing turn-pikes, toll-houses, and other buildings, and repairing the same, and of erecting and making necessary and convenient bridges, &c., and of repairing the road, &c., and otherwise executing the purposes, &c. of the act; and lastly, in paying the interest and reducing the principle of the money subscribed, &c.

In 1823, the plaintiff contracted with the trustees to build a toll-house, which he accordingly completed in 1824. In 1829, the

*Exch. of Pleas, in writing was shewn.* The plaintiff called one of the trustees, who proved that many years since an order had been made to pay this amount, but he did not say that it was in writing. The book was produced, and no such order appeared; there was, therefore, no evidence of a promise in writing. [Parke, B.—We will not trouble you as to the promise in writing. We wish you at present to confine yourself to the question whether the plaintiff can recover for money had and received when the trustees were in funds; whether the 32nd clause postponed any right of action against the trustees until they should be in funds; or whether that clause was directory only upon them to apply the monies when raised as therein enacted. The plaintiff would probably be able to get over any difficulty as to the particulars not being for money had and received; for he would contend that the contract was that the work should be paid for when the trustees were in funds, and, when that happened, that he might declare generally for work and labour. The question, therefore, is on the construction of the clause. Alderson, B.—The question is, whether the work was done and the materials provided to be paid for on request; or whether it was not to be paid for until the trustees had received the funds.] There is nothing in the clause to defer the payment. It is to be found in every turnpike act. The provision is (a), “That all monies which shall arise and be produced by or from such subscriptions as aforesaid, and by and from the tolls by this act granted and made payable, together with the monies which shall from time to time be borrowed upon the credit of the tolls to be collected therein, and all other monies which shall arise or be produced under or by virtue of this act, and not herein or otherwise appropriated or directed to be applied, shall be

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vested in the said trustees for the time being, and shall be applied in the order and manner following; *videlicet*, in the first place, in paying the costs, charges, and expenses attending the preparing, obtaining, and passing of this act, and of preparing securities for the sums so subscribed, or to be subscribed or borrowed; in the second place, in defraying the expenses of erecting or providing turn-pikes, toll-houses, and other buildings, and repairing the same, and of erecting and making necessary and convenient bridges upon the said road, and of repairing the said road, and otherwise in executing the several other powers and purposes of this act; in the third place, in paying the interest accruing upon the several sums of money subscribed, or which shall from time to time be secured upon the credit of the tolls to arise on the said road; and, lastly, in reducing, paying off, and discharging the same several principal sums." [Parke, B.—The legislature do not seem to contemplate that the trustees would enter into contracts until they were in funds. If they do enter into contracts they may be liable generally, though it may be that the parties cannot get satisfaction (a) until afterwards; but the question is, when the cause of action accrued.] There is no hardship upon the plaintiff, for he might have sued out his writ within the six years, though he may not perhaps be able to get execution until afterwards. If the clerk is not liable to an execution, but the plaintiff is put to subsequent proceedings to obtain the fruits of his judgment, it would be an argument to shew that the real construction of the act is, that the liability is incurred at the time, although no proceedings can be effectual until funds are raised.

**B. Andrews and C. Austin, contrà.**—The legislature certainly contemplated that contracts as to toll-houses at

(a) *Wormwell v. Hailstone*, 4 Moo. & P. 512; 6 Bing. 668.

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*Exch. of Pleas,* least should be entered into by the trustees before the funds were raised, for it is by the toll-houses that the funds are to be raised. [Parke, B.—They have power to raise money by mortgage.] The third clause directs that the expenses of toll-houses, &c. shall be paid out of the monies raised. Now, the contract is entered into with the trustees, not on their individual and personal liability, but only in respect of the money which the act of Parliament directs shall be applied to the purpose of paying for this work. In fact, neither the trustees, nor the defendant, their clerk, were liable personally. *Wormwell v. Hailstone* decides that the clerk is not liable to an execution. Suppose a contract for work to be paid for when money is remitted from the *West Indies*; that is the same as in this case. [Parke, B.—Except that here you want the proof of such being the contract.] The contract was made on the footing of the act of Parliament. That appears clearly from the contract and the specifications. The contract is entered into, not on the credit of the trustees, but on the expectation that they will receive the funds under the provisions of the act of Parliament; until those funds were received, it is clear that no fruitful judgment could be obtained. The true construction of the clause is, that there is to be no liability until the funds were received; and if so, no right of action accrued until that period, and the statute is consequently no bar. [Parke, B.—The contract may be a general one—to pay on request, although the plaintiff may not be able to enforce it, so as to recover the fruits of a judgment, for many years. In the case of a contract with a testator, where the executor has pleaded *plene administravit*, and the plaintiff takes judgment of assets *quando*, he may have no fruits of that judgment for many years; still the action was maintainable immediately against the executor, although any execution is postponed. You cannot make out that the present is anything more than a general contract; and if so, the cause of

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action accrued when the work was done. You shew no order or admission in writing to take it out of the Statute of Limitations.] It is submitted, that the order in 1829 was sufficient to take the case out of the statute. It was more than a verbal acknowledgment; it was an act done. Before Lord Tenterden's Act (*a*), a case might have been taken out of the Statute of Limitations, either by a verbal acknowledgment, or an act done. Since the passing of that act, a verbal acknowledgment will not suffice, but an act done which admits the liability may still take the case out of the statute. [*Gurney*, B.—All that passed was in words.]

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**PARKE, B.**—No act will suffice, except the one particularly mentioned in the statute, the payment of part. The issue is on you to shew a promise within six years. How can we say that the order was a note in writing within the statute? If it were in writing at all, we cannot tell, without seeing it, whether it amounts to a note in writing signed by the party within the statute. The rule must be discharged.

The rest of the Court concurred.

Rule discharged.

(*a*) 9 Geo. 4, c. 14.

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WARREN v. WARREN.

A letter containing a libel was proved to be in the handwriting of the defendant, to have been addressed to a party in *Scotland*, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded from C. to *London* to be forwarded to *Scotland*, and it was produced at the trial with the proper post-marks, and with the seal broken:  
*Held*, sufficient *prima facie* evidence that it reached the person to whom it was addressed, and of a publication to him.

The plaintiff and defendant were jointly interested in property in *Scotland*, of which C. was manager. The defendant wrote to C. a letter, principally about the property, and the conduct of the plaintiff with reference thereto, but containing a charge against the plaintiff with reference to his conduct to his mother and aunt:—

CASE for libel. Plea—the general issue.

At the trial, before *Gaselee*, J., at the last *Lent Assizes* for the county of *Essex*, it was proved that the letter in question was in the handwriting of the defendant, addressed to a person in *Scotland*; that it was received from the *Colchester* post-office at H., in *Essex*, and forwarded to *London* to be forwarded to *Scotland*, and it was produced with the proper post-marks, and with the seal broken. The letter was written by the defendant to a person in *Scotland*, who had the management of certain property, in which both the plaintiff and defendant were interested, and principally related to such property; but it contained a charge against the plaintiff of bad conduct to his mother and aunt. It was objected, that there was not sufficient evidence of publication, and that the publication was privileged, on the ground of its being a communication about property in which the defendant and plaintiff were interested. The learned Judge overruled the objection, and told the jury that the letter, being put into the post and received by the party, was a publication. The jury found a verdict for the plaintiff, with a farthing damages. A rule was obtained in *Easter Term* for a new trial, upon the grounds taken at the trial; against which, cause was now shewn by—

*Spankie*, Serjt.—On the evidence produced at the trial, no reasonable doubt could exist that there was at least evidence of publication to go to the jury. The handwriting of the defendant to the letter was proved, and the letter

was produced, bearing the proper post-mark, addressed to a person in *Scotland*, and with the seal broken. [Parke, B.—Surely the production of a letter with the seal broken, and with the post-mark upon it, is strong evidence that it was received by the person to whom it was addressed. Alderson, B.—At least it is *prima facie* evidence of that fact.] As to the second point, it is clear that the part of the letter as to the plaintiff's alleged conduct to his mother and aunt does not fall within the class of privileged communications.

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*Channel, contrâ.*—On the first point, the fact of a letter being written in *Essex*, addressed to a person in *Scotland*, is no proof that it reached the hands of the person to whom it was addressed. [Gurney, B.—The post-master was called, who proved that his handwriting was upon it; that it was received from the post office at *H.*, at the post-office in *Colchester*, and forwarded to *London* on its road to *Scotland*. Was not that at least *prima facie* evidence that it reached its destination?] If it were only *prima facie* evidence, the learned Judge was wrong in treating the fact of the receipt of the letter in *Scotland* as proved. He told the jury, that the letter was published by being put into the post-office and received by the party. He laid stress on the receipt by the party, as if that fact had been proved conclusively. It should have been left to the jury to say whether the party did receive it. *Secondly*, the communication was privileged. The letter was clearly written in answer to a letter which must have been about the property of these parties. That appeared from the contents of the letter itself. The person to whom the letter was addressed was the manager of property to which both the plaintiff and defendant were entitled; and it appeared from the admission, that there had been a suit in *Chancery* about this property. A letter written to the manager of this property about the joint concerns of the plaintiff and de-

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A letter containing a libel was proved to be in the handwriting of the defendant, to have been addressed to a party in *Scotland*, to have been received at the post-office at *C.* from the post-office at *H.*, and to have been then forwarded from *C.* to *London* to be forwarded to *Scotland*, and it was produced at the trial with the proper post-marks, and with the seal broken:

—*Held*, sufficient *prima facie* evidence that it reached the person to whom it was addressed, and of a publication to him.

The plaintiff and defendant were jointly interested in property in *Scotland*, of which *C.* was manager. The defendant wrote to *C.* a letter, principally about the property, and the conduct of the plaintiff with reference thereto, but containing a charge against the plaintiff with reference to his conduct to his mother and aunt:—

—*Held*, that though the part of the letter about the defendant's conduct as to the property might be confidential and privileged, that such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt.

CASE for libel. Plea—the general issue.

At the trial, before *Gaselee*, J., at the last *Lent Assizes* for the county of *Essex*, it was proved that the letter in question was in the handwriting of the defendant, addressed to a person in *Scotland*; that it was received from the *Colchester* post-office at *H.*, in *Essex*, and forwarded to *London* to be forwarded to *Scotland*, and it was produced with the proper post-marks, and with the seal broken. The letter was written by the defendant to a person in *Scotland*, who had the management of certain property, in which both the plaintiff and defendant were interested, and principally related to such property; but it contained a charge against the plaintiff of bad conduct to his mother and aunt. It was objected, that there was not sufficient evidence of publication, and that the publication was privileged, on the ground of its being a communication about property in which the defendant and plaintiff were interested. The learned Judge overruled the objection, and told the jury that the letter, being put into the post and received by the party, was a publication. The jury found a verdict for the plaintiff, with a farthing damages. A rule was obtained in *Easter Term* for a new trial, upon the grounds taken at the trial; against which, cause was now shewn by—

*Spankie*, Serjt.—On the evidence produced at the trial, no reasonable doubt could exist that there was at least evidence of publication to go to the jury. The handwriting of the defendant to the letter was proved, and the letter

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was produced, bearing the proper post-mark, addressed to a person in *Scotland*, and with the seal broken. [Parke, B.—Surely the production of a letter with the seal broken, and with the post-mark upon it, is strong evidence that it was received by the person to whom it was addressed. Alderson, B.—At least it is *prima facie* evidence of that fact.] As to the second point, it is clear that the part of the letter as to the plaintiff's alleged conduct to his mother and aunt does not fall within the class of privileged communications.

*Channel, contrd.*—On the first point, the fact of a letter being written in *Essex*, addressed to a person in *Scotland*, is no proof that it reached the hands of the person to whom it was addressed. [Gurney, B.—The post-master was called, who proved that his handwriting was upon it; that it was received from the post office at *H.*, at the post-office in *Colchester*, and forwarded to *London* on its road to *Scotland*. Was not that at least *prima facie* evidence that it reached its destination?] If it were only *prima facie* evidence, the learned Judge was wrong in treating the fact of the receipt of the letter in *Scotland* as proved. He told the jury, that the letter was published by being put into the post-office and received by the party. He laid stress on the receipt by the party, as if that fact had been proved conclusively. It should have been left to the jury to say whether the party did receive it. *Secondly*, the communication was privileged. The letter was clearly written in answer to a letter which must have been about the property of these parties. That appeared from the contents of the letter itself. The person to whom the letter was addressed was the manager of property to which both the plaintiff and defendant were entitled; and it appeared from the admission, that there had been a suit in *Chancery* about this property. A letter written to the manager of this property about the joint concerns of the plaintiff and de-

*Exch. of Pleas,* defendant in reference thereto, is clearly confidential; and if so, it was protected as a privileged communication, unless the other party could shew express malice.

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**PARKE, B.**—If a letter is sent by the post, it is *prima facie* proof, until the contrary be proved, that the party to whom it is addressed received it in due course. As to the other question, so far as related to the common property, the letter might be confidential; but with regard to that part which reflected on the plaintiff's conduct to his mother and aunt, it is impossible to hold that the defendant was privileged. The manager could have nothing to do with that. The rule must be discharged.

The rest of the Court concurred.

Rule discharged.

#### TIPPETS v. HEANE.

**A**SSUMPSIT for meat, lodging, &c., furnished by the plaintiff for the defendant's son. Plea—general issue and the Statute of Limitations.

In order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt.

At the trial, before *Vaughan, B.*, at the *London* Sittings after last *Hilary* Term, the plaintiff, to take the case out of the Statute of Limitations, proved, by a Mr. *A'Becket*, that he had paid 10*l.* to the plaintiff by the direction of the defendant in the year 1829; but he could not speak to the account on which it was paid, or give any evidence beyond the mere fact of having paid the money by the defendant's direction. The learned Baron left it to the jury to say, whether the 10*l.* was paid on account of the debt in question; and observed to them, that no other account was proved to have existed between the parties.

The jury having found a verdict for the plaintiff, a rule for a new trial was obtained in *Easter Term* by *Ludlow, Serjt.*; against which, cause was now shewn by—

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*Kelly*, who contended that there being no evidence of any other account or transaction between the parties, the jury were right in referring the payment of the 10*l.* to the only account which appeared to have existed between the plaintiff and defendant.

*Ludlow, Serjt., and Petersdorff, contrà*, were stopped by the Court.

**PARKE, B.**—This rule ought to be made absolute. There was not in my opinion sufficient evidence to go to the jury of this being a part payment, so as to take the case out of the Statute of Limitations. In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here, the evidence does not shew any particular account to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for it is necessary, in the third place, to shew that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt. Unless

*Exch. of Pleas,* then, in the present case, it could be collected that the payment was in part of a greater debt, the statute was a bar, and there being no evidence from which a jury were warranted in coming to such a conclusion, the present rule must be made absolute.

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The rest of the Court concurred.

Rule absolute.

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#### GOULD *v.* LASBURY.

A plea that the defendant was discharged by the order of the Insolvent Debtors' Court from the causes of action in the declaration mentioned (*if any*), is bad on special demurrer.

**DECLARATION** in debt on simple contract. Plea—that the defendant was discharged, under the Insolvent Debtors' Act, “from the debts and causes of action, *if any*, and each and every of them.” Special demurrer, assigning for cause, that the said plea did not confess and avoid the cause of action, &c. &c.; and that the plea neither set out the discharge specially, nor was pleaded generally, in the form given by the statute.

**Erle**, in support of the demurrer.—There are two defects in this plea:—*First*, the well-known rule of law, that a plea must either traverse, or confess and avoid, is violated. A plea like this, of confession and avoidance, must admit and confess the matter stated in the declaration distinctly. *Taylor v. Cole* (a) is a decisive authority on this point. So, in *Griffiths v. Eyles* (b), where an hypothetical replication was attempted, Chief Justice *Eyre* said, that the party could not plead hypothetically. The admission here is most clearly hypothetical. *Secondly*, if the statute gives a form of pleading, the party must either conform to that form, or must plead in the more

(a) 3 Term Rep. 292.

(b) 1 Bos. & Pull. 413.

special form, which the usual rules of law would present. *Sheen v. Garrett* (*a*). Here the plea is general, that the party was discharged; but it does not follow the form given by the act, which contains no such words as "if any."

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*Kelly, contrā.*—The general rule, that a party must traverse, or confess and avoid, every material allegation, is not disputed; the question is, whether this plea does not substantially confess the matter in the declaration. Similar expressions are used in numerous instances, and are to be found in all the forms in the books of pleading. In pleas of the Statute of Limitations, of infancy, of bankruptcy, of the Insolvent Debtors' Act, and of set-off, it is usual to use words of this description. The expressions "if any such there be," or "the supposed," are common in all these forms. The usual words were "the supposed" causes of action, which is quite as hypothetical an expression as "if any." In a case of *Gale v. Capern* (*b*), in the *King's Bench*, which is not yet reported, the declaration was for goods sold. There was a plea of set-off on a bill of exchange: the replication alleged that the "supposed" cause of set-off did not accrue within six years, upon which issue was taken. It was held at the trial, that the handwriting of the acceptor and indorsers was admitted, and need not be proved. On motion for a new trial, it was contended that the word "supposed" prevented any such admission; but the Court held, that the word "supposed" did not at all alter the effect of the replication. [Alderson, B.—You would contend that the expression "supposed" is no more than a protestation.] Exactly so. The object of the rule of pleading is not that there should be an absolute, unqualified, and express confession, but that there should be what may amount to a confession in the particular suit. There must

(*a*) 6 Bing. 686.

(*b*) Since reported in 1 Ad. & Ell. 102.

*Exch. of Pleas*, be such a confession as will relieve the other party from  
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The word "supposed" may perhaps be considered as  
no more than "alleged." I find the word "supposed" in  
several of the forms you have adverted to, but not the words  
"if any such there be."] In a plea in abatement for non-  
joinder, the words, "if any such there be," are invariably  
used. The defendant says sufficient if he admits for the  
purpose of the particular action, though he protests for the  
purpose of any other. The forms alluded to shew that it is  
not necessary that the confession should be in the un-  
qualified form contended for on the other side. If the  
plaintiff had replied generally, he would not have been  
bound to prove the cause of action at the trial. The pre-  
sent form is taken from a late edition of an approved book  
of pleading.

*Erle*, in reply.—The plea does not amount to an unqua-  
lified admission. The admission is qualified and hypothe-  
tical. In *Taylor v. Cole, Buller*, J., said, "It is a rule  
in pleading, that the party justifying must shew and admit  
the fact." The illustration of the plea in abatement is un-  
fortunate for the defendant. It is remarkable, that the  
plea in abatement is the only instance in which the words  
"if any such there be" are used. The word "supposed" is  
nothing more than "alleged." Now, when the case of a  
plea in abatement is considered, the exception in that case  
serves rather to strengthen the general rule. The rule as  
to confessing and avoiding is only applicable to a plea in  
bar. A plea in abatement need not confess and avoid:  
the defendant is not bound to traverse or confess all mat-  
ters alleged; he has at that stage nothing to do but to  
shew that the plaintiff may have a better writ, and the  
judgment is not to be that the plaintiff is to recover or not  
on the allegations upon the record, but that the writ be  
quashed, or that the defendant answer over. It is sin-

gular that it is only in the case of such a plea that the words "if any" appear to be usually adopted. The argument from the doctrine of protestations is equally inapplicable. If a person has to answer when he either is bound or chooses to answer one matter only, there are cases where he may take the other matters by protestation; but it is different as to the matter which a party assumes to be answering. Besides, the facts taken by protestation are admitted in the action by a well-known rule of law; but here the admission is coupled with a qualification. In *Gale v. Capern*, the only question was, as to what was the issue to be tried. The handwriting was not in issue, but that had nothing to do with the question of the form of pleading. If it could be matter of doubt on the trial, we have a right to say on special demurrer that it is not well pleaded. [Alderson, B.—In *Taylor v. Cole*, and *Griffiths v. Eyles*, the fact was in the peculiar knowledge of the party pleading.] So, here, the defendant must have known whether he was indebted or not.

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**Lord LYNDHURST, C. B.**—It is difficult to distinguish the expression "supposed" from that of "if any." As there has been a decision in which a construction is said to have been put on the word supposed, we will confer with the Judges of the other Courts.

*Cur. adv. vult.*

On a subsequent day Lord LYNDHURST, C. B., said—In the case of *Gould v. Lasbury*, there was a plea of a discharge under the Insolvent Debtors' Act, which was contended to be bad, because it did not directly confess and avoid the matters alleged in the declaration, but merely stated the discharge from the said causes of action, "if any." A similar point having been argued in the King's Bench, we have conferred with the Judges of that Court

*Exch. of Pleas,* on the subject, and we concur with them in thinking that  
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 the words vitiate the plea. The demurrer, therefore,  
 must be allowed.

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Judgment for the plaintiff.

### HOOKER v. NYE and Another.

Where in trespass q. c. f. the defendant in his plea claims an interest in land, a replication of *de injurid* is bad on general demurrer.

A plea justifying a trespass as a distress for rent, stated that the plaintiff held and enjoyed as tenant under the defendant at the rent of &c., without shewing any reversion in him:—  
*Held good.*

**TRESPASS** for breaking and entering a dwelling-house, and taking goods therein. Plea—that the plaintiff held and enjoyed the dwelling-house in which &c., as tenant to the defendant *John Nye*, by virtue of a demise thereof, and at the rent of 7*l.*, payable quarterly. The plea then justified the trespass under a distress for two quarters of the rent in arrear. Replication—*de injurid*. General demurrer and joinder.

The Court called upon *Kingslake* to support the plea.— Although two or three matters are contained in the plea, yet they only amount to one defence. *Selby v. Bardons* (*a*). [Lord *Lyndhurst*, C. B.—An interest arising out of the land is claimed in the plea. That, and not the multifariousness, prevents the plaintiff from replying *de injurid*.] It is at most only matter of special demurrer. There is no modern case where the objection has prevailed, except on special demurrer. In *Cooper v. Monke* (*b*), there was a special demurrer; so in *Cockerill v. Armstrong* (*c*), *Jones v. Kitchen* (*d*), *O'Brien v. Saxon* (*e*), and *Selby v. Bardons* (*f*), the parties demurred specially. The statutes of 25 *Eliz.* and 4 *Anne*, requiring such a matter of form to be

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|-------------------------------------------|---------------------------------------|
| ( <i>a</i> ) 3 B. & Ad. 2; 1 C. & M. 500. | ( <i>e</i> ) 2 B. & C. 908; 4 Dowl. & |
| ( <i>b</i> ) Willes, 52.                  | Ryl. 579.                             |
| ( <i>c</i> ) Willes, 99.                  | ( <i>f</i> ) 3 B. & Ad. 2; 1 C. & M.  |
| ( <i>d</i> ) 1 B. & P. 76.                | 500.                                  |

*Exch. of Pleas,  
1834.*

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specially pointed out. There is only one instance to the contrary, *Furdon v. Weeks* (*a*), and that was before the statute of 4th *Ann.* Since the passing of that act, it has been the uniform practice to demur specially in such a case. The rule is a technical one, and the objection merely one of form. [Alderson, B.—Suppose that matter of record was alleged in the plea as well as matter of fact, so that there would be different trials for the different allegations; still it would be only one defence; but it would most decidedly be matter of substance. In *Selby v. Bardons*, Lord Tenterden did not treat it as a matter of form, but clearly considered it of substantial importance, that the plaintiff should be bound to take a distinct issue. Lord Lyndhurst, C. B.—The statute of *Eliz.* enacts that the Judges shall give judgment without regarding want of form, unless specially demurred to. Now, the Court in the time of Car. 2, decided that this objection must prevail on general demurrer. That shews that it was not form. The statute of *Anne*, after enumerating many objections of a nature dissimilar to the present, enacts, that the Court shall give judgment according to the very right, without regarding any such imperfections, &c., or any other matter of like nature, except they are specially shewn for cause of demurrer. The present objection can hardly be said to be of the like nature with those enumerated.] Then, the plea is bad. It does not state that there is any reversion in the landlord, by reason of which he could distrain. It may be said that the tenant is estopped from disputing the title of his landlord; but in the late case of *Preece v. Corrie* (*b*), it was held, that where a tenant whose term ended on the 11th of November, let the premises, orally, to that day, it being a demise of the whole of his interest, the tenant had no right to distrain.

(*a*) 3 Levinz, 65.

(*b*) 5 Bing. 24.

*Exch. of Pleas,  
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*Comyn, contrà.*—The presumption is, that the landlord is the freeholder. There are some exceptions to the usual rule of the tenant's being estopped, as, for instance, the tenant may shew that the landlord's title has expired, but the tenant is always bound to bring himself within those exceptions. In the present case, he should have replied this answer if he meant to set it up.

**Lord LYNDHURST, C. B.**—In *Preece v. Corrie* the matter was pleaded, and the party did not rely on the supposed defect. The plea here is in the usual form, that the plaintiff held as tenant. *Prima facie* that gives a right to distrain. It is possible that there might be an answer, but if so it should be replied.

**ALDERSON, B.**—The replying *de injurid*, when that replication is inadmissible, is most clearly matter of substance, and may be taken advantage of on a general demurrer (*a*).

The rest of the Court concurred.

**Judgment for the defendant.**

(*a*) Though bad on general demurrer, the defect is aided by verdict. See 1 Chitty's Pleadings, 585, where the authorities are collected.

*Exch. of Pleas,  
1834.*

SIMKIN v. ASHURST.

**A**SSUMPSIT on a special agreement. The first count stated, that on the 29th day of *July* 1830, to wit &c., by a certain memorandum of agreement then and there made between the plaintiff of the one part, and the defendant of the other part; the plaintiff agreed to let, and the defendant agreed to take certain premises, to wit, a certain dwelling-house and premises situate and being at the foot of *Highgate Hill* near *Holloway*, then in the occupation of the plaintiff, for the term of two years, wanting three days, from the 8th day of *August* then next, subject to the clear yearly rent of 100*l.* and to the payment of all taxes, rates, &c., which the plaintiff was subject to by a certain lease under which he the plaintiff then held the said premises; and the plaintiff agreed to sell and the defendant agreed to purchase all the fixtures in the said house as per list thereafter written and subscribed to the said memorandum of agreement, at the sum of one hundred guineas, to be paid upon having possession, which was to be on or before the said 8th day of *August* then next, and the said fixtures and articles were to be valued in the usual way before having possession: and it was thereby declared and agreed, that if the defendant should agree with the superior landlord of the said premises for a longer term than that thereby granted, he was to pay such further sum at which the said articles, to wit, the said fixtures, were valued; and if he should not agree with the landlord for a further term at the end of the said term thereby granted, then the plaintiff was to have the liberty of taking the said fixtures at the sum of 60*l.*, and if he should elect so to do, and to pay the said sum to the defendant on or before the 5th day of *August*, 1832; the defendant to keep the said premises and fences in as good a condition as they then

The plaintiff being possessed of a term of years of which two years remained unexpired, demised to the defendant for the remainder of his term minus three days. By the agreement of demise, the defendant was to pay 100 guineas for the fixtures, and a further sum if he agreed with the superior landlord for a longer term. The defendant remained in possession for about three quarters of a year after the expiration of the original term, and paid the superior landlord for so doing at a higher rate than the rent under the lease. There was an interview between the defendant and the original landlord at which the subject of a renewal was discussed, but the landlord proved that they came to no agreement personally, and that he referred the defendant to his solicitor: —*Held*, that the defendant appeared to have remained in possession only as tenant by suffer-

ance, and that the plaintiff was not entitled to the further sum.

*Exch. of Pleas,* were, and to leave the same in that condition, reasonable use  
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and wear excepted, and all outgoings were to be cleared to the said 8th day of *August* by the plaintiff; and the plaintiff averred, that a certain list or schedule of the fixtures, mentioned and referred to in and by the said memorandum of agreement, was then and there written and made and subscribed to the said memorandum of agreement, and in and by which list or schedule it was declared, that, if the plaintiff was bound to deliver up any of the said fixtures to the landlord of the said premises, they were not to be appraised to the defendant. The declaration then stated mutual promises, and proceeded as follows:—And the plaintiff says, that he was not bound to deliver to the landlord any of the fixtures expressed in the said list or schedule which were appraised to the defendant, and that the said fixtures were then and there valued in the usual way at a large sum of money, to wit, the sum of 145*l.*, whereof the defendant had then and there notice, and the defendant in part performance of the said memorandum of agreement on his part, and of his said promise and undertaking, then and there paid to the plaintiff, for and on account of the said fixtures, the said sum of one hundred guineas, which he by the said memorandum of agreement had agreed to do: and the plaintiff says, that he afterwards, and after the making of the said memorandum of agreement, and in performance and fulfilment thereof on his part, afterwards, to wit, on the 8th day of *August* next after the making of the said memorandum of agreement, to wit, the 8th day of *August* in the year 1830 aforesaid, delivered possession of the said premises, and also of the fixtures specified in the said list or schedule to the defendant, and the defendant then and there accepted the same, under and by virtue of and upon the terms contained in the said memorandum of agreement, and remained and continued in possession from the day and year last aforesaid until, and at, and after the expiration of the said

term of two years wanting three days, from the 8th day of *August*: and the plaintiff in fact says, that after the making of the said memorandum of agreement, and after the defendant had been let into and taken possession of the said premises and fixtures, to wit, on the 7th day of *August*, in the year 1832, to wit, at *London* aforesaid, he the defendant agreed with the superior landlord of the said premises, to wit, one *George Ring*, for a longer term than that granted by the said memorandum of agreement, to wit, a term of three quarters of a year beyond the said term granted by the said memorandum of agreement; and by virtue thereof remained in possession of the said premises after the expiration of the said term granted by the said memorandum of agreement, to wit, for the said term of three quarters of a year after the expiration of the said term granted by the said memorandum of agreement; and by reason of the premises, and according to the tenor and effect, true intent and meaning of the said memorandum of agreement, and his promise and undertaking in that behalf, he the defendant became liable to pay, and ought to have paid to the plaintiff a large sum of money, to wit, the sum of 40*l.*, being the further sum or excess of the sum at which the said fixtures were so valued, above the said sum of 105*l.* so paid by the defendant to the plaintiff as aforesaid, for the said fixtures; but which sum of 40*l.*, or any part thereof, the defendant has not yet paid to the plaintiff, although he was afterwards, and after he had so agreed with the superior landlord of the said premises for such further time as aforesaid, to wit, on the 1st day of *September* in the year aforesaid, and often since at *London* aforesaid, requested by the plaintiff to pay him the same; but he to do so has always hitherto wholly neglected and refused, and still refuses, and the same is and remains due and unpaid to the plaintiff at *London* aforesaid, contrary to the tenor and effect, true intent and meaning of the said memorandum of

Esch. of Pleas,  
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*Exch. of Pleas,* for a *term*; that *term* might be longer or shorter, but it was  
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necessary to prove an agreement for a *term*. It appears that, after the term ended, *Ashurst* continued in possession only as tenant by sufferance. The rule must be discharged.

The rest of the Court concurred.

Rule discharged.



#### HALLEN v. RUNDER.

*A.* having occupied a house as tenant to *B.* in which there were certain fixtures which *A.* had purchased on entering the house and which he had a right to remove during his tenancy, agreed, at *B.*'s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, *B.* agreeing to take them at a valuation to be made by two brokers. *A.*, at the expiration of his tenancy, delivered up possession of the house to *B.*, leaving the fixtures on the premises. On the following day the fixtures were valued by two brokers at the sum of 40*l.* 10*s.*, and the valuation was signed by them accordingly. *A.* having brought *indebitatus assumpsit* for the price and value of fixtures, &c. bargained and sold, and for fixtures sold and delivered:—Held that the action was maintainable, and that this was not a sale of an interest in land within the 4th section of the Statute of Frauds.

And *seemle*, that a note or memorandum in writing was not necessary within the 17th section of that statute relating to the “Sale of Goods” above the value of 10*l.*

money lent, money paid, money had and received, and for money due upon an account stated. The defendant pleaded the general issue.

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At the trial, before *Gurney, B.*, at the Sittings in *London*, after last *Michaelmas Term*, it appeared in evidence that the plaintiff had for several years, prior to the 25th of *March*, 1833, occupied a house in *Nelson Square*, under the defendant, and that a few days before that day, when the plaintiff was on the point of removing to another house, the defendant called upon the plaintiff, and requested him not to remove the fixtures, saying, she would take them at a fair valuation; and it was agreed that each party should appoint their own broker. It further appeared, that, when the plaintiff entered the house as tenant to the defendant, he had paid 23*l.* for fixtures to the out-going tenant; and that prior to his quitting the house, he had added very considerably to the quantity of fixtures. The plaintiff gave up possession of the house on the 24th of *March*, leaving the fixtures on the premises. On the following day, the plaintiff sent for, and obtained the key of the house from the defendant's son, for the purpose of having the fixtures valued, and the key was accordingly delivered to the plaintiff's broker, who, together with one *Sexton*, a broker, who met him there on the defendant's behalf, valued the whole of the fixtures at 40*l.* 10*s.*, and they both signed the appraisement at that valuation. After the valuation was made, the key was returned to the defendant. On the trial it was proved by *Sexton*, the defendant's broker, that the defendant had desired him to go to the house in question to look at some fixtures and stoves; that she said, she did not know whether she would agree with the plaintiff for them or not, but that he was to appraise them. It was objected for the defendant, *first*, that there was no contract in writing proved, inasmuch as the appraisement was not signed by the defendant, or by her authority, and there-

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fore that the sale was void under the 17th section of the Statute of Frauds; and, *secondly*, that this form of action was not maintainable: that the fixtures not having been severed continued to be part of the freehold, and could not be considered as goods and chattels; and therefore, that *indebitatus assumpsit* was not maintainable, and that the action ought to have been special on the agreement. The learned Baron told the jury that if they believed that the defendant had authorised the broker to appraise the fixtures, he was of opinion that she had given him authority to sign the appraisalment; and consequently, that there was a sufficient note in writing, if that were necessary. The jury found a verdict for the plaintiff for the amount of the valuation. The learned Judge gave the defendant leave to move to enter a nonsuit: and accordingly in *Hilary Term last*—

*F. Kelly*, moved either for a nonsuit or a new trial:—  
*First*, this form of action is not maintainable for fixtures before severance. The case of *Lee v. Risdon* (a) is an authority to shew that the price of fixtures affixed to a house cannot be recovered under a declaration for goods sold and delivered. [*Bayley*, B.—In that case was *Lee* the owner of the inheritance? because, if he was, the fixtures would be part of the freehold. In *Lee v. Risdon* could the fixtures have been seized under a *fi. fa.* against the tenant? Lord *Lyndhurst*, C. B.—In *Lee v. Risdon*, the house and fixtures were both taken of the landlord, and not from the outgoing tenant, and they were part of the freehold at the time of the sale. *Bayley*, B.—Here these fixtures never were the property of the landlord, but of the tenant, who had a right to remove them during the term. Lord *Lyndhurst*, C. B.—The tenant had a right to remove the fixtures during the term, and having that right he con-

(a) 7 *Taunt.* 188.

tracts with the defendant for the sale of them, at a valuation, and agrees, at her request, not to remove them; and the key of the house is afterwards delivered to the defendant before the valuation, and she is put into possession, and has never since relinquished it. What is there to shew that *indebitatus assumpsit* will not lie in such a case?] The case of *Lee v. Risdon*, it is submitted, shews that a severance of the fixtures is not effected by a sale of them by the landlord to the tenant, because if it is so effected, that decision cannot be supported. [*Bayley*, B.—It effects a severance when the purchase is complete, but not before.] Here the purchase was not complete, as there was no possession. [*Lord Lyndhurst*, C. B.—The learned Judge was of opinion that there was. The fixtures were left in the house, and the key was given up. *Bayley*, B.—An action lies to recover the price of an estate bargained and sold. Unless the present action is maintainable, how can you seize fixtures under a *fi. fa.*, and how can they go to the executor and not to the heir? Since *Lee v. Risdon* it has been decided that growing crops are to be considered as goods and chattels.] At all events there was no evidence of any authority to the broker to do more than to appraise the fixtures. There was no authority given to the broker to sign the contract.

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*Lord Lyndhurst*, C. B.—I am of opinion, on the *first* point, that no rule should be granted. Here the defendant was the landlady of the premises, and the tenant being about to leave them entered into an agreement to sell the fixtures to his landlady, and if they had been accepted and removed there is no doubt that an action of *indebitatus assumpsit* would have been maintainable, as for fixtures bargained and sold, or sold and delivered; and I think this is distinguishable from *Lee v. Risdon*, on the ground stated by my brother *Bayley*. On the other point I think there is some doubt whether there was sufficient

*Exch. of Pleas,* to justify the jury in considering that the defendant's broker had authority to sign the appraisement, and on that ground you may take a rule to shew cause. *Bayley*, B.—  
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v.  
RUNDER. It may possibly be a question whether the defendant had not actually accepted the fixtures, as it does not appear that she gave the plaintiff any notice to take them away. The Court granted a rule *nisi* on this point, against which—

*Thesiger* and *Petersdorff* now shewed cause.—The contract for the fixtures was complete and unconditional, and not an imperfect contract depending on the price being ascertained. There was a perfect contract that in consideration that the plaintiff would not remove the fixtures during the term, the defendant would take them at a valuation to be subsequently made. The appraisement was only to ascertain the amount to be paid, and the moment the price was ascertained, the agreement was complete and perfect. Here the jury have found that *Sexton*, the defendant's broker, had authority to appraise, and the case of *Poulter v. Killingbeck* (*a*), is therefore in point. There *A.* had agreed verbally with *B.* to let him land rent-free, on condition that *A.* should have a moiety of the crop; while the crop was still on the ground it was appraised for both parties; *A.* declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to *B.*, without stating the special agreement; and it was held that the action was maintainable, as the special agreement was executed by the appraisement, and the action arose out of something collateral to it. So, here, the moment the price was ascertained, the agreement was complete and perfect, and *indebitatus assumpsit* was maintainable. In *Salmon v. Watson* (*b*), the agreement was verbal, to take a house and purchase the fixtures at a valuation to be made

(*a*) 1 Bos. & Pull. 397.

(*b*) 4 B. Moore, 73.

by two brokers. The defendant, having taken possession of the fixtures and paid part of the sum, was held liable for the remainder in *indebitatus assumpsit* on the account stated. That, it is submitted, goes the whole length of the present case. The only additional circumstance there was, the payment of part of the money. Here, possession of the house and fixtures was taken by the defendant, which shews that the contract was complete. It was only during the term that the tenant could remove the fixtures, and the defendant having obtained possession of the fixtures, affirmed the contract to pay for them at the valuation, and then all that was necessary to perfect the agreement was to appraise them. The defendant could not intend to give her broker authority to appraise, without intending to give him authority to complete the appraisement by signing it. It has been the practice, where the possession of land sold has been given, to insert a count for land bargained and sold. [Parke, B.—There you must shew an actual conveyance of the land to the defendant, and the mere act of giving possession would not be sufficient to maintain the *indebitatus* count. In point of practice such a count seldom occurs, and it generally could not be sustained, because the deed of conveyance which must be shewn to pass the interest in the land generally contains a release of the purchase-money.]

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*Kelly*, in support of the rule.—The articles in question are either fixtures and constitute part of the freehold, and therefore this form of action is not maintainable to recover the value of them before severance, or else they are goods and chattels, in which case it was requisite that the contract should have been reduced into writing and signed by the defendant or by some person authorised by her. In this case the original contract was by parol: then the appraisement is made and signed by the defendant's broker: that, it is contended on the other side, was a sufficient memorandum in

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writing to satisfy the statute. There was, however, no memorandum signed by the defendant herself: then, was the broker her agent lawfully authorised to sign a contract of purchase? It is submitted that the evidence given at the trial proves the very reverse of his having any authority to do so. It was proved by the broker himself that the defendant desired him to go and look at the fixtures, but that she said she did not know whether she should agree with the plaintiff for them or not. That, it is submitted, in no way authorised the broker to sign a contract in writing for the purchase of the fixtures, and did not constitute him her agent for that purpose. His authority at the most only extended to appraising the fixtures. But it has been said, that, by using the word appraise, an authority to sign the appraisement was necessarily implied. [Alderson, B.—The question is, whether the Statute of Frauds has any application to this case. Parke, B.—The general rule is, that goods, by being affixed to the freehold, become parcel of it, subject to the right of the tenant, if he affixed them or purchased them, to remove them during the term, or to part with them to any incoming tenant: here the tenant, at the request of the landlord, agrees to waive his right to remove the fixtures, in consideration of the landlord's agreeing to pay for them according to a valuation to be afterwards made.] If there was such an agreement, it ought to have been made the subject of a special count, as it could not be in the nature of a transfer from hand to hand, the fixtures not being chattels but part of the freehold, the tenant having a right to use them during the term, and to remove them at the expiration of it. These are either to be considered as goods and treated as severed from the freehold, or else they continue parcel of the freehold, and are an interest in land within the fourth section of the statute. In *Lee v. Risdon*, the ground of the decision was, that the fixtures continued to be parcel of the freehold until they were sever-

ed, and *Horn v. Baker* (*a*) is to the same effect. [Parke, B.—The plaintiff in this case did not give the defendant a right to the fixtures before the expiration of the term, but he agreed to waive his right to sever them during the term, and to sell them to her at the end of the term. The only question is, whether the amount is recoverable on such a count as this.] It is submitted that it is not; but even admitting that it could, that must be on the ground that the fixtures come within the description of goods and chattels, and then they are within the 17th section of the Statute of Frauds, and a note in writing was requisite to render the contract valid. But it is submitted, that there must be a special count to enable the plaintiff to recover, and that he cannot recover on the common *indebitatus* count, either for goods and fixtures bargained and sold, or for fixtures and effects sold and delivered. If the absolute right to the fixtures was transferred by this agreement, there is nothing to prevent it from coming within the words goods, wares, and merchandizes in the 17th section of the statute. If this were to be held otherwise, all the mischiefs which the statute intended to remedy would arise. The learned Judge told the jury that if they thought the defendant had authorised the broker to appraise the fixtures, that he thought was a sufficient authority to him to sign the appraisement. [Parke, B.—You say, that if it did import an authority to sign a valuation merely as such, it did not give him authority to sign a valuation which would of itself be a contract, and that all that he was authorised to sign was a valuation, and not a contract. However, the question turns on the form of action.] Without arguing whether a valuation may be an agreement within the Statute of Frauds or not, there was here no authority given to sign such a valuation, and the defendant being in this case the reversioner the taking of

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the key of the house cannot be construed to amount to  
an acceptance of the fixtures.

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*Cur. adv. vult.*

The judgment of the Court was now delivered by PARKE, B.—In this case, which was argued before my brothers *Bolland, Alderson, Gurney*, and myself, on *Saturday* last, all the questions were disposed of by the Court in the course of the argument except one, namely, whether the plaintiff could recover the amount of the valuation of the fixtures upon any count in this declaration. The first count stated, that in consideration that the defendant had bargained for and bought of the plaintiff, and that the plaintiff, at the request of the defendant, had then and there sold to the defendant divers chattels, fixtures, and effects, then lying in and being fastened to a certain dwelling-house and premises, at the price of 40*l.* 10*s.*, the defendant undertook to pay the price so agreed upon. The second count stated that the defendant was indebted to the plaintiff in 50*l.* for the price and value of goods, chattels, fixtures, and effects, bargained and sold by the plaintiff to the defendant at her request; and in the like sum for the price and value of other goods, chattels, fixtures, and effects, sold and delivered by the plaintiff to the defendant at her request; and in the like sum upon an account stated; and the question is, whether these counts, or any part of them, are applicable to the plaintiff's case. We think that the first count, or that part of the second count which charges the defendant with the price and value of fixtures bargained and sold, or indeed that which states her to be indebted for fixtures sold and delivered, is upon the evidence supported, and it is unnecessary to say whether the other part of the second, upon the account stated, was or was not sustained. The situation of the plaintiff was this, upon entering as tenant to the defendant, he had paid upwards of 20*l.* for the interest

which a former tenant had in certain chattels which had been annexed to the freehold, but which that tenant had a right to sever and remove whenever he pleased during his term; and the plaintiff had also, during his term, annexed other chattels to the freehold, which also he had the like right of removing. Shortly before the expiration of this term, the plaintiff agreed with the defendant, his lessor, that he should forbear to remove all these chattels so annexed, which he was about to do, and that they should be taken by the defendant on a valuation to be made by two appraisers. This valuation was ascertained by two brokers, both of whom must, upon the finding of the jury, be taken to have been properly appointed for this purpose: the value was fixed at 40*l.* 10*s.* The plaintiff left the chattels attached to the freehold, and the defendant took possession of them.

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When chattels are thus fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels, as stated by Lord Chief Justice Gibbs in *Lee v. Risdon* (a), and in the very able work of Messrs. Amos & Ferard on Fixtures; but, whilst annexed, they may be treated for some purposes as chattels: for instance, in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels—*Poole's case* (b)—in like manner as growing crops of corn or other *fructus industrielles*, which go to the executor, and to which they bear a close resemblance. The case above cited of *Lee v. Risdon*, however, decides that they cannot be treated as goods in an action for the price; and although in the subsequent case of *Pitt v. Shew* (c), they were held to fall under the description of "goods, chattels, and effects" in an action of trespass, we

(a) 7 Taunt. 191. (b) 1 Salk. 368. (c) 4 B. & A. 206.

*Exch. of Pleas,* 1834.  
cannot consider the previous authority as overruled, because in the latter case it is probable that the articles taken had been severed from the freehold before the sale by the defendant, though Lord Chief Justice *Abbott* certainly does not mention that circumstance as the ground of the decision.

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The plaintiff, therefore, cannot recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot as for fixtures bargained and sold, or sold and delivered. The real nature of the contract between the plaintiff and the defendant was, that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels. And after the contract is executed, and the plaintiff has given up possession to the defendant, the question is, whether he may not declare as for fixtures bargained and sold, or sold and delivered. The term "fixtures" has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, in which sense it is used in the Treatise on Fixtures above referred to. And it has certainly been the practice, since the decision in *Lee v. Risdon*, to declare for the amount of valuations of such fixtures between one tenant and another, or the tenant and landlord, in a count in *indebitatus assumpsit* for fixtures. Although this may not be the most accurate mode of describing the real contract between the parties, we think it is sufficient, and that the plaintiff may recover upon it; and the case bears a strong analogy to that of a contract by a tenant to give up to his landlord or successor those growing crops to which he is entitled by the common law or the custom of the country, as emblements, and the value of which after the contract is executed may certainly be recovered on a count for

crops bargained and sold. See *Mayfield v. Wadsley* (*a*). This question on the form of the declaration was indeed decided by the Court on a motion for a rule *nisi*; but as it was suggested by the learned counsel for the defendant, that the Court so decided under the impression that this was a sale of an interest in land, within the 4th section of the Statute of Frauds, leaving the point to be discussed whether the appraisement was a sufficient memorandum in writing, we have allowed the point to be argued, and given it full consideration, and decided it. We are quite satisfied that this is not a sale of any interest in land, for the reasons given in the course of the arguments; and the judgment of the Court, and particularly of Mr. Justice *Littledale* in *Evans v. Roberts* (*b*), upon the subject of growing crops, is an authority to the same effect; but treating this as not being a sale of any interest in land, we think the declaration is sufficiently adapted to the case.

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Rule discharged.

(*a*) 3 B. & C. 357; 5 D. & R. 224. (*b*) 5 B. & C. 829; 8 D. & R. 611.

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ALIVON and Another, Provisional Syndics of the Estate and  
Effects of PETER BEUVAIN, a Bankrupt, *v.* FURNIVAL.

DEBT.—The third count of the declaration stated, that before *Peter Beuvain* became a bankrupt, to wit, on

In an action  
brought by the  
syndics of a  
French bank-  
rupt upon an

arbitral sentence and ordonnance, whereby the defendant was adjudged to pay the bankrupt a sum of money:—*Held*, 1st, That the agreement of reference (made in *France*) was sufficiently proved by an examined copy and the evidence of the attesting witness, it appearing that the original was deposited with a notary at *Paris* for safe custody, and that it is the established usage in *France* not to allow the removal of a document so deposited; 2ndly, That the proceedings in foreign Courts must be presumed to be consistent with the foreign law until the contrary is distinctly shewn; 3rdly, That the principle adopted by a foreign jurisdiction in assessing damages cannot be impugned, unless contrary to natural justice, or proved to be not conformable to the foreign law; 4thly, That two out of three syndics of a French bankrupt may sue without naming the third, or stating that the *Juge Commissaire* has authorized the suit, such appearing to be the rule in *France*.

Quare whether the objection to the non-joinder of the third syndic could be taken on the plea of *nil debet*?

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&c., in parts beyond the seas, to wit, at &c., by a certain instrument in writing then and there made between the defendant of the one part, and the said *Peter Beuvain* of the other part, the said parties made and concluded a certain agreement; and in the same instrument it was agreed between the said parties, that, in case of disputes, the parties recognised the jurisdiction of a certain Court, to wit, of the Tribunal of Commerce, sitting at *Paris*, in the Department of the *Seine*; and they thereby submitted the matters in difference to the decision of two arbitrators, being merchants, to be named by the parties respectively, such arbitrators, in case of disagreement, to have the power of naming an umpire, and that the two or the three arbitrators might be named by the Tribunal of Commerce, at the request of either of the said parties; and that the decision of such arbitrators or their umpire was to be supreme, and without appeal; and that after the making of the same instrument, and before the said *Peter Beuvain* became a bankrupt, to wit, on &c., at &c., such disputes as were mentioned and contemplated in and by the same instrument arose and were depending between the said *Peter Beuvain* and the defendant; and thereupon afterwards and before the said *Peter Beuvain* became a bankrupt, to wit, on &c., at &c., the said *Peter Beuvain* duly, according to the laws of *France*, impleaded the said defendant in the said Court, in the same instrument in that behalf mentioned, that is to say, in the Tribunal of Commerce sitting at *Paris*, in the Department of the *Seine*, and then and there duly, according to the laws of *France*, prayed and required that arbitrators should be appointed by the said Court in pursuance of and according to the provision so as aforesaid contained in the same instrument: and the plaintiffs further say, that afterwards and before the said *P. Beuvain* became bankrupt, to wit, on &c., persons were duly, according to the laws of *France*, appointed in and by the

said last-mentioned Court to decide the said disputes which had so arisen between the said *Peter Beuvain* and the defendant—as by the said appointment, duly, according to the laws of *France* and the course and practice of the said last-mentioned Court, made and still remaining therein, will more fully appear: and that afterwards and before the said *Peter Beuvain* became a bankrupt, to wit, on &c., at &c., the said arbitrators, having heard the allegations and proofs of the said parties respectively, duly made their certain award, called an arbitral sentence, of and concerning the said disputes so referred to them as aforesaid, and did thereby award and order that the defendant should pay to the said *P. Beuvain* two several sums of foreign money, to wit, the sum of 51,589 francs 50 centimes, and the sum of 157,819 francs 68 centimes, making together the sum of 209,409 francs 18 centimes, as by the same arbitral sentence, duly according to the law of *France* and the course and practice of the said last-mentioned Court, now remaining in the same Court, will more fully appear; and that afterwards and before the said *P. Beuvain* became a bankrupt, to wit, on &c., by a certain ordinance, duly according to the law of *France*, made at *Paris* aforesaid, to wit, at &c., the President of a certain Court in the kingdom of *France* aforesaid, to wit, the President of the Civil Tribunal of First Instance in the Department of the *Seine*, declared and ordered that the said arbitral sentence should be executed in all its particulars according to its form and contents, as by the said ordinance, duly according to the law of *France* and the course and practice of the last-mentioned Court, registered in the same Court, and now remaining therein, will more fully appear; and that the said *P. Beuvain*, after the giving and making of the said judgment and of the said arbitral sentence and ordinance, and before the giving and registering of a certain judgment hereinafter mentioned, to wit, on &c., at

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&c., became and was a bankrupt according to the laws of *France*, and the said plaintiffs were then and there duly appointed, and then and there became and were and still are, provisional syndics of the estate and effects of the said *P. Beuvain*, according to the law of *France*; whereupon and whereby the plaintiffs, as such provisional syndics as aforesaid, according to the law of *France*, became and were and still are entitled and empowered, in their own names to sue for and recover all debts which were due to the said *P. Beuvain* at the time when the said *P. Beuvain* became bankrupt, and entitled to enforce, by action in their own names, as such provisional syndics as aforesaid, all claims and demands which the said *P. Beuvain*, at the time he so became bankrupt as aforesaid, had or might have against the defendant; and that the said cause was afterwards, to wit, on &c., removed by the defendant into a certain other Court in the kingdom of *France* aforesaid, to wit, a certain Court called the Royal Court of *Paris*, by way of appeal, and such proceedings were thereupon afterwards had in the said last-mentioned Court, that, by the judgment of the same Court, pronounced on the day and year aforesaid, after setting forth therein, as the fact was, that the plaintiffs, as such provisional syndics as aforesaid, had been made parties in the said cause in the room of the said *P. Beuvain*, the appeal of the defendant was dismissed, and the defendant was condemned to pay a fine and the expenses of the appeal, as by the said last-mentioned judgment, duly according to the law of *France* and the course and practice of the said last-mentioned Court, still remaining therein, will more fully appear; which several judgments, arbitral sentence, and ordinance still remain in their full force and effect, not in anywise reversed, annulled, set aside, paid off, satisfied, or discharged: and that the said sum of 209,409 francs 18 centimes, at the time of the giving and making of the said several judgments, arbitral sentence, and or-

dinance, was and still is of great value, to wit, of the value of 8200*l.*, of which several premises respectively the defendant, during all the time aforesaid there, had notice; yet, &c. Plea—*Nil debet.*

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A commission, issued for the examination of witnesses, was executed at *Paris*. The original agreement, in the French language, deposited with a notary, was produced before the commissioners; and the signatures of *Beuvain* and the defendant were proved by the attesting witness *Albert*, who stated, in the course of his examination, that, according to the law of *France*, a notary, with whom an original agreement has been deposited, cannot part with it except by the directions of a French Court (*a*). The agreement was expressed to be "*fait au double.*" An examined copy, verified by the former witness, was returned by the commissioners. A copy of the original award subscribed by the arbitrators was proved by the persons who had examined it with the original, (which it appeared was deposited in the "*Tribunal de Première Instance,*") and also returned by the commissioners; and evidence was given of the facts that *Beuvain* was a merchant, that he was in debt, and that he had stopped payment (*b*).

The cause was tried before Mr. Baron *Vaughan* at the *Middlesex* Sittings after *Trinity Term*, 1833. The depositions taken under the commission, and the papers returned therewith, were read.

Official copies, verified by the seals impressed thereon, and proved to be those of the respective Courts, were put in to shew the judgment of the Tribunal of Commerce appointing arbitrators named by the parties; another

(*a*) "Les Notaires ne pourront se dessaisir d'aucune minute, si ce n'est pas dans les cas prévus par la loi, et en vertu d'un jugement."—*Loi du 25 Ventose, an 11, sur le*

*Notariat, tit. 1, sec. 2, pl. 22, Appendice aux Codes.*

(*b*) See *Code de Commerce, Art. 437.*

*Exch. of Pleas,* judgment of that Court, removing the arbitrator named by  
 1834. *Furnival*, on the ground that he was a foreigner and not a merchant, and appointing, on *Furnival's* default, a new arbitrator; a judgment of the Royal Court confirming, on appeal, the latter judgment; another judgment of the Tribunal of Commerce, extending the time for making the award; another judgment of the Royal Court, confirming the latter judgment on appeal, and further extending the time; the arbitral sentence; the ordinance, or *exequatur* of the President of the Tribunal of First Instance; another judgment of the Tribunal of Commerce, declaring *Beuvain* to be "*en état de faillite*"; another judgment of the same Court, appointing the plaintiffs and one *Chatonnay* provisional syndics, with power "*agir ensemble ou séparément, l'un en cas d'empêchement, ou d'absence de l'autre—sous la surveillance de M. le Juge Commissaire*"; and another judgment of the Royal Court, confirming the ordinance on appeal, to which the plaintiffs and *Chatonnay* were therein expressed to be made parties, as provisional syndics, in the place of *Beuvain*.

M. *Colin*, a French advocate, examined for the plaintiffs, stated, that, according to the law and practice in France, one or two, of three or more syndics, may sue, without proving the disability of the rest, or the authority of the *Juge Commissaire*, and deposed to the usage in France on various points of evidence. A French notary who was examined for the defendant stated, that syndics could not bring an action unless authorized by the *Juge Commissaire*, and said that he did not suppose a solicitor in France would bring an action for syndics unless the authority of the *Juge Commissaire* had been obtained.

The defendant's counsel took a variety of objections, the nature of which will appear in the course of the argument. The learned Judge, without pronouncing any opinion upon the objections, nonsuited the plaintiffs, giving them leave to move to enter a verdict for 8300*l.* A rule nisi having been obtained—

*Follett* and *Tomlinson* shewed cause.—This is an action on an award, and the agreement on which the award is founded has not been sufficiently proved. The plaintiffs have offered as evidence a copy of the document deposited with the notary, who might have attended the trial with the original. The agreement is expressed to be made in duplicate, “*au double*” (a), and the *French* law requires that there shall be as many originals as there are parties having distinct interests (b); yet the plaintiffs have neither accounted for the other original part, nor given the defendant notice to produce it.

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The arbitrators were not duly appointed. According to the agreement, they were to be merchants appointed by the parties respectively. The arbitrator who was nominated by the defendant, was set aside by the Tribunal of Commerce, which appointed another arbitrator in his place, and there is no evidence that, by the law of *France*, the Tribunal had power to do so. [Parke, B.—Is not the judgment itself *prima facie* evidence of the law therein laid down?] The arbitrator substituted by the Court was not a merchant; and the Court has neither exercised its power of appointing both arbitrators, nor followed the nomination made by the parties. The award was made by *Beuvain's* nominee, and by another nominated by the Court, without the assent of the defendant, (who protested against the appointment,) and who was not qualified according to the agreement.

The arbitrators have exceeded their authority. They have awarded to *Beuvain* the exclusive use of the patent in question throughout all *France*, and the item of 157,819 francs 68 centimes arises from a calculation of prospective profits for fifteen years. The judgment affirming the award does not conclude the question, for the judgment

(a) The agreement concludes &c.”  
thus: “*Fait double et signé en  
presence de M. Charles Albert,*”

(b) *Code Civile*, Art. 1325.

*Exch. of Pleas*, affords only *prima facie* evidence of the right, and may be questioned. [Parke, B.—The decision in *Martin v. Nichols* (a) was well considered.] That was an application for the extraordinary aid of the Court of Chancery to impeach the judgment of a Colonial Court, and it was observed that the parties might appeal to the King in Council. Eyre, C. J., in the case there referred to by the Vice-Chancellor, said, that the judgment of foreign Courts might be examined. In the present case, the French Courts have not adjudicated on the merits at all.

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The ordinance merely renders the award executory (b), and is only formal; and, like the making of an agreement of reference a rule of an English Court for the purpose of issuing an attachment, does not exclude objections to the award itself. The judgment of the Royal Court rejects the appeal from the ordinance expressly on the ground that the questions raised on the award are matters of a primary nature, and therefore not the subject-matter of appeal; and the question is not decided whether the award *per se* is good according to the law of France. No evidence is given to shew that the decision of the arbitrators is consistent with that law, and it is manifestly inconsistent with natural justice.

It has not been proved that the plaintiffs had any authority to bring this action. According to the language of their appointment, they are to act "*sous la surveillance de M. le Juge Commissaire*"; and the law under which they are appointed so limits their powers, and declares the authority of the Juge Commissaire necessary to their proceedings to recover debts (c). The evidence of M. Colin does not distinctly disprove the necessity for shewing that authority in proceedings of this sort in France, and is inconsistent with the language of the appointment and the law, and contradicted by the defendant's witness

(a) 3 Sim. 458.

(c) *Code de Commerce*, Art.

(b) See *Code de Procédure Civile*, Art. 1020 & 1021.

454 & 492.

**M. Girard.** It was incumbent on the plaintiffs to shew clearly their authority and title to sue. *Tenon v. Mars* (*a*).

The action is brought by two out of the three provisional syndics appointed. It is true that they are in terms empowered to act "*ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre;*" but no evidence has been given of the absence or incapacity of the syndic not joined. Even if that absence or incapacity had existed, still the action should have been expressly brought in the names or on the behalf of the three syndics who represent *Beuvain*. So, in a case just decided in the Court of *Common Pleas*, *Trimbey v. Vignier* (*b*), it was held that, where the indorsement made in *France* of a *French* bill is general or in blank (*c*), the indorsee suing in this country must proceed in the name of the indorser. So, according to the English law, all the assignees of a bankrupt must join in an action (*d*). The plaintiffs have not pursued the authority conferred by the language of the appointment, an act done by two out of three not being a due exercise of a power to act jointly or separately (*e*).

The arbitral sentence is stated in the declaration to be in the Court of Commerce. The evidence shews that it is registered in the Court of First Instance: and therefore there is a variance.

The declaration throughout describes *Beuvain* as a *bankrupt*; and the alleged rights of the plaintiffs are therein expressly founded on his *bankruptcy*. In the event of a merchant stopping payment, the French law (*f*) defines three classes of cases, with various incidents peculiar to each, namely, "*faillite*," "*banqueroute simple*," and "*banqueroute frau-*

(*a*) 3 Mann. & Ryl. 38. 8 Barn. & Cres. 638.

(*b*) 1 Bingh. N. C. 151.

(*c*) See *Code de Commerce*, Arts. 136, 137, & 138.

(*d*) See *Snelgrove v. Hunt*, 2 Stark. 424, S. C. 1 Chit. Rep. 71.

The latter report states the plead-

ings, from which it appears that the action was brought exclusively on a contract made with the *assignees*.

(*e*) Co. Litt. 181. b.

(*f*) *Code de Commerce*, Arts. 437, 438, & 439.

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*Exch. of Pleas, duleuse.*" The French proceedings in evidence shew that  
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 there was no bankruptcy of either kind, but merely a  
 "faillite," and that *Beuvain* was not a bankrupt, but  
 "failli."

*Bompas, Serjt., Manning, and J. Henderson*, in support of the rule.—This is in substance an action on a judgment. It appears from the French proceedings, that *Beuvain* and the defendant were partners in the transactions out of which these differences grew, and, according to the French law (*a*), those differences could be decided only by arbitrators. The power of appeal possessed by the defendant (*b*), was exercised by him, and his appeal was rejected. The ordinance renders the arbitral sentence absolutely executory (*c*), and, unless successfully appealed from, conclusive (*d*). It is plain, then, that the defendant was absolutely bound in *France* by this arbitral judgment; and there being no question as to jurisdiction, no evidence on the part of the defendant impugning that judgment, and no irregularity apparent *ex facie*, it affords *per se* sufficient proof of the rights which it purports to establish.

The plaintiffs' case, however, may be sustained without ascribing to the award and ordinance the attributes of a judgment. The production and proof of the original agreement before the commissioners, coupled with the copy given in evidence, sufficiently shew the agreement. It appears that the original is beyond the control of this Court, and that it was deposited with the notary for safe custody; and one of the witnesses sworn under the commission, deposes, that, according to *French* law, it cannot be removed out of the notary's office without the authority of a French Court. It is, therefore, sufficiently manifest

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| (a) <i>Code de Commerce</i> , Art.<br>51.<br>(b) <i>Id. Art. 52.</i> | (c) <i>Id. Art. 61.</i><br>(d) <i>Code de Procédure Civile</i> ,<br>1016. |
|----------------------------------------------------------------------|---------------------------------------------------------------------------|

that this original could not be produced before the jury. The expression "*fait double*," at the foot of the agreement, is not explained in evidence, and does not necessarily raise the inference attempted to be drawn from it, that there was another part having the same obligatory effect. If such an inference were drawn, it is at least not to be further presumed that one complete original (and the case supposes only two) was delivered to either of the parties who were mutually bound; and the only other presumption, *viz.* that it also remained with the notary, removes the objection by accounting for that part, and the proof of either part in such case is sufficient.

By the terms of the agreement the parties expressly submitted themselves to the jurisdiction of the Tribunal of Commerce, and the judgment of that Court, which was confirmed on appeal, is sufficient, in the absence at least of any evidence impugning it, to answer the objection that the arbitrator nominated by the defendant was improperly removed. A sufficient reason is assigned in the judgment for the removal, *viz.* that the arbitrator nominated by the defendant was not legally qualified to be an "*arbitre juge*," being a foreigner. The defendant not having within the appointed time nominated another arbitrator, the Court exercised its power as if he had never appointed an arbitrator; and the power was, in substance, as well exercised by nominating the arbitrator chosen by *Bewain*, and a new arbitrator on the defendant's default, as it would have been by nominating two new arbitrators.

It is not clearly shewn in the evidence whether the arbitrator nominated by the Court was a merchant, but assuming that he was not, still as the award has been confirmed on appeal, when this objection might have been taken, it must now be presumed, as there is no proof to the contrary, that the Court did not in this respect exceed its power. On the agreement it does not appear that the restriction of choice of merchants imposed on the parties extends to the Tribunal of Commerce.

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The confirmation of the award on appeal sufficiently shews that the award itself is consistent with French law, and there is no evidence to the contrary. It is needless to inquire as to that part which awards to *Beuvain* the exclusive use of the patent, because the present action is not founded on that part; and, even if the award were bad *pro tanto*, it might be good for the rest. The award of the 51,589 francs 50 centimes is founded on proof of an excess to that amount of the expenses over the amount which the defendant by the agreement guaranteed to be the *maximum*, and that item has never been questioned. With respect to the item of 157,819 francs 68 centimes, the arbitrators in awarding it have construed the agreement as importing a *garantie* that the profits of the undertaking should amount at the least to a certain sum annually during the duration of the agreement, *viz.* fifteen years, and the agreement will fairly bear such a construction. The anticipated profits and the mutual penalties are stated therein at very high rates. *Beuvain*, in case of failure on his part, was bound, under article 9 of the agreement, to pay the defendant 20,000 francs a year for fifteen years, and thus was contingently liable to the extent of 300,000 francs. The arbitrators, proceeding on the principle of a *garantie* of such prospective profits, have calculated damages as they have been calculated in an action in an *English* Court for not granting a lease where the improved value is proved to exceed the rent agreed to be reserved, *viz.* by multiplying the profit by the number of years, and making a suitable reduction for present payment.

The evidence of M. *Colin* shews that the antecedent authority of the *Juge Commissaire* is not necessary to the validity of proceedings of the present kind in *France*, and the witness for the defence on this point states in effect no more than his opinion as to the course which a *French* solicitor would pursue. From the *French* proceedings in evidence it may be concluded that where syndics proceed in the *French* Courts against the debtors of the estate, it is

unnecessary to allege or prove the authorization of the Juge Commissaire. The syndics of *Beuvain* are in the appeal in the Royal Court made parties to the suit in the room of *Beuvain*, yet there is not in any part of those proceedings the slightest allusion to the Juge Commissaire. Considering that these *French* records state minutely every incident of the suit down even to the names and fees of the ushers, the absence of any reference to the Juge Commissaire tends directly to shew that his authorization needed not averment or proof. It might be presumed that the syndics are authorized by him to perform their duty of recovering debts; and the question whether they are so authorized affects only the interests of third persons; the issue to be tried on these pleadings was, whether the money was due to the syndics, not whether the payment ought to be thus enforced. The 1 Geo. 4, c. 119, s. 11, enacts that no suit at law instituted by the assignees of an insolvent shall proceed further than an arrest on mesne process, without the consent of the major part of the creditors given at a meeting called for the purpose; yet it has been held that the defendant in an action brought by the assignees can in no way avail himself of this provision, as it was not made for his benefit; and that the assignees need not in such action aver or prove their authority to sue. *Doe v. Spencer* (a); *Dance v. Wyatt* (b).

The testimony of M. *Colin*, on this point uncontradicted, clearly shews that in the *French* Courts two out of three syndics may sue, without alleging or giving evidence of the absence or incapacity of the third. In the present case there was indeed such evidence. A witness, cross-examined by the defendant's counsel as to a conversation with the plaintiff's agent, deposed on his re-examination, as a further part of the same conversation (which was therefore

(a) 3 Bingh. 204; 11 B. Moore, (b) 6 Bingh. 486; 4 Moore &  
7, 232. Payne, 201.

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*Exch. of Pleas*, matter to go to the jury (*a*),) that the agent stated that  
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*Chatonnay* (the syndic not joined) was in *Italy*. M. *Colin's* evidence sufficiently supports the allegation in the declaration, that the plaintiffs, according to the law of *France*, are entitled to sue in their own names. The non-joinder of the third syndic at the utmost could only be the subject of a plea in abatement—as in the cases of executors and administrators, the plaintiffs here suing in *autre droit* (*b*). There is nothing to raise the presumption of any legal obligation to name the third at all, or of any ground for applying to this case the strict rule of *English* law in the construction of the words "jointly or separately." In *Guthrie v. Armstrong* (*c*) the Court expressed an indisposition to extend that rule, and refused to apply it where there were reasonable grounds for presuming a different intention of the parties. Here, there is sufficient ground for such presumption. It is not to be inferred that the Court intended, that, if the number of the syndics capable of acting should be reduced to two by accident, it should be further reduced to one by the application of a technical rule, which has not been shewn to belong to the *French* law.

The averment in the declaration, that the arbitral sentence remains in the Tribunal of Commerce is immaterial and may be rejected. *Walker v. Witter* (*d*).

The sworn interpreters on their oath have rendered the words "*failli*" and "*faillite*" by the *English* words bankrupt and bankruptcy, and there is nothing to impeach their testimony as to the fidelity of the translation. It is evident that the *French* law recognises three species of bankruptcy, called in *French* "*faillite*," "*banqueroute simple*," and "*banqueroute frauduleuse*," and the translators have used the generic word. These species do not differ from

(*a*) *Queen's case*, 2 Brod. & Bing. 298.      (*c*) 5 Barn. & Ald. 628. And see the observations on *Bonifant*

(*b*) *Com. Dig. tit. Abatement*, (E.) 13, 14, (F.) 10.      (*v. Greenfield*, 4 Mann. & Ryl. 190. (*d*) 1 Dougl. 1.

each other in what relates to the rights and powers of the syndics (a). Exch. of Pleas,  
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*Cur. adv. vult.*

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The judgment of the Court was afterwards delivered by PARKE, B.—Many objections were taken in this case to the right of the plaintiffs to recover: *first*, it was contended that the agreement was not proved; *secondly*, that this was to be considered as an action on the award only, and that the arbitrators were not duly appointed; *thirdly*, that the award was not made pursuant to the submission, and was therefore void; *fourthly*, that the plaintiffs had no right to maintain the action; *fifthly*, that the declaration was not proved.

We have considered these objections, and are of opinion that they are not well founded, and that the rule must be absolute to enter a verdict for the plaintiffs.

The first objection is that the agreement was not properly proved; this divides itself into two branches, one, that even if there were no evidence of a duplicate original being in existence, this proof would not have been sufficient, because the original deposited with the notary ought to have been produced, or clear proof given that by the written law of *France* it could not be removed. And another branch of this objection is, that it was proved that there was another original of this agreement in existence; that the copy was only secondary evidence, and not admissible until the original was accounted for, and, if in the possession of the defendant, notice to produce given; and that no such notice was given. It seems to be clear that this document was not acknowledged before a notary, and is therefore not to be deemed a notarial act. It was simply deposited for safe custody; but there was sufficient evidence in the testimony of M. *Colin* of the established

(a) *Code de Commerce*, Art. 600.

*Exch. of Pleas,* usage at least in *France*, though it was not a provision of  
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the written law, not to allow the removal of documents so deposited, and consequently to let in secondary evidence of the contents; for such evidence is admissible where it is in effect out of the power of a party to produce the original, and that was sufficiently proved in this case to the satisfaction of the learned Judge whose province it was to decide upon this question, and we cannot say that his decision was wrong. The second branch of this objection is that there was evidence of the existence of a duplicate original, and that there is an established rule that all originals must be accounted for before secondary evidence can be given of any one. There is no doubt as to this rule; but we are not satisfied that there was any such *duplicate original* in this case which had the same binding force and effect *on the defendant* as the one deposited and proved. The only evidence of its existence is the expression "*fait double*" at the foot of the agreement; but what is the precise meaning of these terms, and what was the nature of the duplicate executed in this case, if there was one, was not made out by the evidence; and neither in the numerous cross-interrogatories exhibited to the witness *Albert*, nor in his depositions which were read on the trial, is there one which hints at the existence of any other obligatory document than the one deposited with the notary. It is very true that the 1325th article of the *Code Civil* requires duplicates where there are two interests; but I do not see how we can properly take notice of this law, as it was not proved on the trial. The objection is *strictissimi juris*, and beside the justice of this case; and we think that it ought not to succeed unless the existence of a *duplicate original*, in the proper sense of that word, was more distinctly made out than it was in this case.

I now come to the objections on the merits; and first as to the appointment of the arbitrators—*First*, it is contended, that, by the express agreement of the parties, in article 12, merchants must be appointed, and that the

Tribunal de Commerce had no power to appoint others. This depends on the construction of that article; which is as follows:—" *En cas de discussions, les parties reconnaissent la jurisdic<sup>n</sup>ion du Tribunal de Commerce, s<sup>nt</sup>ant à Paris, Département de la Seine, et elles seront soumises à deux arbitres négociants respectivement nommés par elles, qui, en cas de désaccord, auront la faculté de nommer un troisième pour les départager; les deux ou les trois arbitres pourront également étres nommés par le dit Tribunal de Commerce à la réquisition de l'une des parties, et la décision d'accord ou celle du partage sera souveraine et sans recours en appel.*" We do not think that the Tribunal de Commerce is restrained by this clause from appointing arbitrators not merchants; the parties are, but the Court has a general power; and it is to be remarked, that in none of the proceedings in the French Courts is the objection taken that the Tribunal de Commerce exceeded its powers in this respect. It is then said that the Tribunal de Commerce has no power to annul the appointment made by the defendant himself, which they have done by their act of 15th Nov. 1827. Now by this act it appears that the appointment of a foreigner as arbitrator was not a due exercise of the power reserved by the 12th article, and void, and was the same as if no arbitrator at all had been named by the defendant; and we must assume the judgment of the Court to be according to the French law, at least until the contrary was distinctly proved, according to the principle laid down in *Becquet v. Macarthy* (a). Next it is contended that the Tribunal ought to have appointed two arbitrators and not one. But is there any substantial difference in allowing the former appointment to stand, naming another; and expressly appointing the arbitrator already named and the other jointly *de novo*? Certainly there is not; and in this respect also we must

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(a) 2 B. & Ad. 957.

*Exch. of Pleas,* assume that the Tribunal de Commerce acted according to  
1834. law, unless the contrary be proved.

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The third head of objection is the award itself, which, it is suggested, is not warranted by the submission. The award has proceeded upon the principle that the defendant, instead of being merely placed in *statu quo*, and reimbursed the expenses incurred upon the faith of the contract (which could have been done by awarding as damages the expense of constructing the new works, deducting the then value of the materials, to *Beuvain* under all the circumstances of the case); had a right to be placed in the same situation as if the defendant had fulfilled his contract. And it is impossible for us to say that this principle of adjusting the damages is wrong, as being contrary to natural justice; and there is no evidence that it is not conformable to the law of *France*. Indeed it appears to follow the rule laid down in the 1149th article of the *Code Civil*.

The fourth head of objection is, that the plaintiffs cannot sue, and this objection subdivides itself into several—*First*, that by the terms of the appointment two out of three cannot sue. The appointment is as follows:—“*Le tribunal nomme pour syndics provisoires de la faillite des sieurs Beuvain & Co. le sieur Chatonney, le sieur Deloustal, et le sieur Alivon, portes en la dite liste, pour exercer les dites fonctions de syndics provisoires telles qu' elles sont décrites dans les articles 476 à 525 du Code de Commerce, lesquels syndics pourront agir ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre, sous la surveillance de M. le Juge Commissaire.*” The answer to this objection is, that, by the law of *France* in such a case, two out of three may do an act as well as one separately, and that is distinctly proved by M. *Colin*.—*Secondly*, it is said that they ought to have the previous authority of the Juge Commissaire. They are directed by the appointment to act under the *surveillance* of the

Juge Commissaire (*a*); but M. *Colin* proves that they may bring an action without his authority—that is the effect of his testimony; and though the defendant's witness, *Girard*, gave evidence to the contrary, it seems to amount only to this, that a solicitor would not act properly in doing so, not that the want of previous directions would avoid the act and constitute a defence to the action; and this is in conformity with the principle on which the cases cited for the plaintiff relating to actions brought by assignees of insolvents in this country were decided.—*Thirdly*, it is insisted that by the law of *France* two cannot maintain an action for the debt due to the bankrupt. And this also depends upon the evidence. That *all* may sue, appears by articles 492 and 499 of the *Code de Commerce*, both given in evidence. That the bankrupt is deprived of the administration of his effects, appears by clause 442, also read. And M. *Colin* deposes that two have the same power to act under this appointment as three, and there is no evidence to the contrary.—*Fourthly*, it is insisted that, if two can bring an action, it is a *condition precedent* upon the construction of the instrument of appointment that the third should be *absent*, or should have objected to the act done; and that there was no proof of either circumstance in this case; but in our opinion this would be to put a very strict construction upon the terms of the appointment. It seems to us that the act of two only sufficiently implies the absence or want of consent of the third, and that the effect of the authority given by the appointment is in substance to authorize two to do valid acts as to third persons, without the other. And it was in fact proved, that, by the law of *France*, one of the syndics might act if the other should not, without proving the absence of that other. Lastly, it is said that though two may act and bring an action, yet they must *sue in the name of all*. Now, the effect of the testimony of *Colin* is

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(a) By Art. 492 of the *Code de Commerce*, “Sous l'autorisation.”

*Exch. of Pleas,* that two may sue in *France* without a third, and the witness for the defendant does not prove the contrary, and there seems no reason why it should not be so. The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country; but it should seem that the syndics act as mandatories or agents for the creditors; the whole three, or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action, created by the law of that country; and we think it may by the comity of nations be enforced in this, as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires. *Dutch West India Company v. Moses* (*a*), *National Bank of St. Charles v. De Bernales* (*b*), *Solomons v. Ross* (*c*). We do not pronounce an opinion whether this objection is available on the plea of *nil debet*, or ought to have been pleaded in abatement, (though we were much struck with the argument of the learned counsel for the plaintiff,) as we think it is not available at all upon the evidence in this case.

The fifth head of objection is that of variance, that the award is said to be registered in the Tribunal de Commerce, instead of the Court of First Instance; but the answer is that this is clearly surplusage.

The sixth, that there is a variance, because *Benvain* is averred to be a bankrupt, whereas he was only an insolvent, or *en état de faillite*; but this depends entirely upon the argument that the English term "bankrupt" necessarily means the same as the French, *banqueroute*, which it does not; and it is to be observed that in the English copy of the appointment of syndics the word *faillite* is translated bankruptcy.

These are all the objections to the plaintiff's right to

(*a*) 1 Strange, 612. (*b*) 1 R. & Moody, 190. (*c*) 1 H. Black, 131, n.

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recover, and we think that they are not well founded, and that the action is maintainable without attributing to the acts of any of the Courts the same force as if they had been judgments between the litigating parties. The third count is the one adapted to the plaintiff's case.

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Rule absolute.

THE defendant having been charged in execution upon the judgment in the above cause—

*Follett*, in *Michaelmas Term*, moved that he might be discharged out of custody, or that he might have such other relief as to the Court, under the circumstances, should seem meet. He moved upon affidavits, stating that an appeal was now pending in *France*, in the Court of Cassation, from the judgment or award upon which the plaintiffs had proceeded and recovered in this Court; and that the fact of such appeal existing had not been brought before this Court in the proceedings that had already taken place. [*Parke*, B.—It ought to have been insisted upon by the defendant at the trial. An appeal has no other effect, while it is pending, than that of staying execution.] All that the defendant asks is, that the Court will stay the execution. [*Parke*, B.—There is no writ of error upon the judgment of this Court.] As the judgment here proceeded upon the fact of there being a valid judgment in the *French Courts*, and, as it now appears that such judgment is appealed against, and may, probably, be reversed, there is ground for the equitable interference of this Court.

The Court said, that, at that stage of the proceedings in the *French Court*, there was no ground for the relief prayed; but that, if the Court of Cassation reversed the judgment, the application might be renewed.

Rule refused (*a*).

(a) The cases decided in the *English* and *American Courts*, and the doctrine of the foreign jurists with regard to the effect of foreign judgments, &c. are fully examined by Mr. Justice *Story*, in his highly valuable *Commentaries on the Conflict of Laws*, p. 436 to 515, 8vo., *Boston*, *V.S.*, 1834.

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1834.

WILLIAM CROSSKEY the Elder v. MILLS.

The plaintiff, the elder brother and creditor of an intestate, being in possession of the goods of the intestate under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, and he employed the defendant, an auctioneer, to sell the goods.

After the sale by the defendant, the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff, but to retain the money until all the creditors should come in, that it might be divided rateably amongst them. No letters of administration were taken out:

—*Held*, that the defendant was *prima facie* bound to account to the plaintiff from whom he had received the goods, and even if he would have been at liberty to set up the *jus tertii*, and shew as a defence against the plaintiff that he was bound to account to a third person, still that he was liable, no title being shewn by him in any third person.

**ASSUMPSIT.**—The first count stated, that, in consideration that the plaintiff at the request of the defendant would deliver to the defendant divers goods and chattels of him, the said plaintiff, to wit, &c. (describing them), of great value, to wit, of the value of 180*l.*, of &c., to be sold and disposed of by the said defendant for and on account of the said plaintiff for reward to be paid by the said plaintiff to him, the said defendant, in that behalf; he, the said defendant, undertook and promised the said plaintiff that he, the said defendant, after the sale thereof, would render a true and just account of the sale thereof to the said plaintiff, and would account to the said plaintiff for the monies arising from such sale whenever he, the said defendant, should be thereunto requested, after a reasonable time for that purpose should have elapsed from the time of the sale thereof; and the plaintiff averred, that he, confiding &c., did afterwards, to wit, on &c., at &c., deliver the said goods and chattels to the said defendant to be sold and disposed of by the said defendant, and on account of the said plaintiff, for reasonable reward, to be paid by the said plaintiff to the said defendant in that behalf, and that the defendant did afterwards, to wit, on &c., at &c., sell and dispose of the same for and on account of the said plaintiff for divers sums of money, amounting in the whole to 180*l.*, and that although the plaintiff afterwards, and after a reasonable time for that purpose had elapsed from the time of the sale, to wit, on &c., at &c., requested the defendant to render a true and just account of the said sale to the said plaintiff, and to account to him for the monies arising from such sale; yet

that the defendant not regarding &c., but contriving &c., had not rendered to the plaintiff a just and true or other account of the sale of the said goods and chattels, or any part thereof, or accounted to the plaintiff for the money arising from such sale or any part thereof, but had hitherto wholly refused, and still refused, so to do.

The second count was for goods sold and delivered, money had and received, and for money due on an account stated. The defendant pleaded *non assumpsit*.

At the trial before *Gaselee*, J., at the last Spring Assizes for the county of *Sussex*, it appeared, that, in *August*, 1828, one *John Crosskey*, being indebted to the plaintiff in 180*l.* for money lent, executed a bill of sale of his furniture and stock in trade to the plaintiff. That *John Crosskey* died in *May*, 1833, in embarrassed circumstances, and immediately after his death the plaintiff took possession of the furniture and stock under the bill of sale, and gave instructions to the defendant to sell the goods in question. It was proved by one *Russell* that he went by the plaintiff's desire to the defendant, and told him he was to sell the furniture and stock in trade of the late *John Crosskey*; and that he, the witness, desired the defendant to see the plaintiff and inspect the bill of sale, which the defendant accordingly did, and also took an inventory of the effects, in order to enable him to prepare the necessary catalogue. The catalogue when prepared was headed as follows:—

“ For the benefit of Creditors. To be sold by auction, “ by *W. Mills*, on *Wednesday* next, the 29th of *May*, “ and following days, all the well-selected stock in trade, “ household furniture and effects of the late Mr. *J. Crosskey*, *Market Street, Rye, Sussex.*”

But it did not appear that this catalogue was ever submitted to the plaintiff, or was so headed to his knowledge; but that it was suffered to remain so after it was posted, because it expressed the intentions of the plaintiff, who had said that he should not insist on his bill of sale, but

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should divide the property amongst the creditors. The defendant sold the stock, and, on *Russell's* application on the plaintiff's behalf for an account of the sale, the defendant first mentioned verbally 145*l.* 3*s.* 9*d.*, but he afterwards wrote a note to him as follows:—

“Sir,—In going through the whole very precise, I found I made an error of 2*l.*, the total amount 143*l.* 3*s.* 9*d.*, which I will give in full statement in a short time. Your's, respectfully,

“W. Mills.

“Rye, 10th June, 1833, Mr. Russell.”

The defendant was subsequently applied to both by letter and personally to render his account and pay the balance after retaining his own charges, which he ultimately refused to do until the whole of the creditors of *John Crosskey* should have come in and proved their debts, stating as his reason the receipt of the following letter, which was put in on the part of the defendant, and which a Mr. *Attree*, a solicitor, proved he had written to the defendant, at the request of Mrs. *Crosskey*, the widow of the late *John Crosskey*:—

“Sir,—We are desired by the widow of the late *John Crosskey* to give you notice, that the money arising from the sale of his effects is not to be paid over to any one creditor, but to be retained until all the creditors shall have come in and proved their debts, and then to be divided rateably and in proportion among them. We shall by to-night's post write to Mr. *Bartlett* at *Birmingham*, the principal creditor, for instructions. We are, Sir, your's obediently,

“*Attree, Clarke & M<sup>r</sup> Whinnie.*

“Mr. W. Mills, Auctioneer, Rye, Sussex.”

“Brighton, 11th July, 1833.

“P. S. You will please to acknowledge the receipt of this by return of post, and at the same time furnish us with

the best statement you can of the debts owing by *Crosskey* at his death."

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Mrs. *Crosskey* also proved that she had given Mr. *Attree* instructions to write to the defendant and desire him to hold the money till all the creditors came together. She also proved that she had not taken out administration, and that she did not know that any body had, and that her husband did not make a will.

The plaintiff obtained a verdict for 55*l.* 7*s.*, the learned Judge reserving leave to the defendants to move to enter a nonsuit, if the Court should be of opinion that the plaintiff had no right to maintain the action. *Platt* having obtained a rule accordingly—

*Spankie*, Serjt., and *Hutchinson* shewed cause.—The plaintiff having employed the defendant to sell these goods has a *prima facie* title, which the defendant is not at liberty to dispute as against him. Even if the defendant could in point of law dispute the title of the plaintiff, and set up the *jus tertii*, he has proved no case of title in any third person. He did not shew that the widow or son of the deceased had taken out any letters of administration. The plaintiff may afterwards be liable to a third person as the representative of the deceased, or he may be a trustee for the creditors, but the defendant has no right to dispute the title of the plaintiff who employed him to sell the goods. It does not appear that either the widow or her attorney had any authority to interfere. The goods were delivered by the plaintiff to the defendant to sell, he was therefore bound to account; he did send in an account, but has not paid.

*Platt, contra.*

*PARKE*, B.—The rule must be discharged. It is clear that the plaintiff was the person who originally employed

*Exch. of Pleas,* the defendant to sell. Therefore, *prima facie*, the defendant was bound to account to the plaintiff. Admitting that the defendant could set up the *jus tertii*, and shew that he was liable to account to a third person, it is not shewn here that there was a title in any third person. No person has taken out letters of administration. It occurred to us, that though the defendant was employed personally by the plaintiff, yet he might have been in reality so employed for a definite body of creditors, and, if employed for such definite body, it might be that he was bound to account to them; but, on looking through the evidence, we do not find that view borne out. All that appears is, that the defendant had general instructions to sell, and that the sale was said to be for the benefit of the creditors. It may be that the plaintiff was a trustee for them.

The rest of the Court concurred.

Rule discharged.

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#### READ v. POPE.

In debt on a judgment for the plaintiff in an inferior Court, the declaration must allege that the cause of action in the original suit arose within the jurisdiction of the inferior Court.

**D**EBT on a judgment of a County Court.—The declaration alleged that the plaintiff, who was plaintiff in the County Court, recovered the judgment within the jurisdiction of the County Court, but did not allege that the cause of action in the original suit arose within the jurisdiction of the County Court. General demurrer and joinder. The case was argued in *Easter Term* by—

*Kelly*, in support of the demurrer.—It does not appear upon this declaration that the cause of action for which the plaintiff had judgment in the County Court arose within the jurisdiction of that Court; in other words, it does not appear that the inferior Court had jurisdiction to give such judgment. The distinction on this subject be-

tween inferior and superior Courts is well known. In a superior Court, every thing is intended to be within the jurisdiction; in an inferior Court, every material fact must be alleged to be within the jurisdiction. It cannot be inferred that the Court had jurisdiction from the averment that the plaintiff recovered within the jurisdiction. The rule laid down in *Sollers v. Lawrence* (a) is, "that nothing must be intended in favour of their jurisdiction, but that it must appear by what is set forth on the record that they had such a jurisdiction." In *Moravia v. Sloper* (b), a distinction was taken between a plea of justification by the officers of the Court, who need not aver that the cause of action arose within the jurisdiction, and a similar plea by the plaintiff in the original action, who must shew that the cause of action arose within the jurisdiction of the Court. *Herbert v. Cook* (c), which is reported in the notes to *Moravia v. Sloper*, is a strong authority in support of the present demurrer. That was an action of debt on the judgment of an inferior Court, and the declaration stated that the plaintiff levied his plaint in the Court below for a cause of action arising within the jurisdiction of the Court, and that such proceedings were thereupon had &c., that the plaintiff recovered &c. The defendant pleaded that the cause of action arose out of the jurisdiction, and not within it; and, upon demurrer, the Court held the plea good, and gave judgment for the defendant. In *Briscoe v. Stephens* (d), the defendant, to a declaration in *indebitatus assumpsit*, pleaded a recovery for the same cause of action by the plaintiff in an inferior Court; to which the plaintiff replied, that both plaintiff and defendant resided out of the jurisdiction of the inferior Court, and that the cause of action arose out of the jurisdiction; and the Court of *Common Pleas*, on demurrer, held the replication

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(a) Willes, 417.

3 Doug. 101.

(b) Ibid. 30.

(d) 2 Bing. 213; S. C. 9 Mo. 413.

(c) Ibid. 37, reported at length

*Exch. of Pleas.* a good answer to the plea. The cases cited in the judgment of Lord Chief Justice *Best* from *Levins* and *Rolle's Abr.* (*a*), are also in point. The general rule to be collected from all the authorities is, that, in every case except that of an officer justifying under the process of an inferior Court, the party pleading the proceedings of an inferior Court, either in a declaration, plea, or other pleading, is bound to shew the matter in question to have arisen within the jurisdiction of the Court. There are, perhaps, some expressions in text books which may be cited to the contrary; but there is no adjudged case which is at all inconsistent with the principle established by the authorities which have been cited on behalf of the plaintiff.

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*Mahon contrâ.*—The averments in this declaration are sufficient. It is stated that the judgment was recovered within the jurisdiction of the Court. It is not necessary that it should be averred that the defendant became indebted within the jurisdiction of the inferior Court. In the notes to *Pitt v. Knight* (*b*), it is said, that, in pleading the judgments of inferior Courts, “it is now held not to be necessary to set out the cause of action, or to aver that the defendant became indebted within the jurisdiction of the Court.” [Lord *Lyndhurst*, C. B., the passage proceeds, “it is sufficient to say, that at a certain Court &c., held at &c., *A. B.* levied his plaint against *D.* for a cause of action *arising within the jurisdiction of the Court;*” that explains the preceding part of the passage, and it is an authority against you.] So, in *Bentley v. Donnelly* (*c*), cited in *Jacques v. Cesar* (*d*), in an action on the case for rescuing a debtor taken upon mesne process sued out of the *Palace Court*, it was decided that it was not a suffi-

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| <i>(a) Adney v. Vernon</i> , 3 Lev. 243; 1 Roll. Abr. Escape, F. pl. 3.<br><i>(b) 1 Wm. Saund. 92</i> , n. (2). | <i>(c) 8 T. R. 127.</i><br><i>(d) 2 Wm. Saunders, 101, a a, n. (2).</i> See n. ( <i>b</i> ), <i>Id.</i> |
|-----------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|

cient ground to arrest the judgment that it was not alleged that the cause of action in the inferior Court arose within the jurisdiction. *Rowland v. Veale* (*a*), and *Lucking v. Denning* (*b*), are authorities in favour of the plaintiff. [*Bolland*, B.—In *Murray v. Wilson* (*c*), the declaration was on a judgment of nonsuit in an inferior Court, and it was objected on demurrer that the declaration was ill, because it did not allege that the plaint was levied for a cause of action arising within the jurisdiction, but the Court held that allegation not to be necessary.]

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*Kelly* in reply.—The authorities are easily reconcileable. In the case of *Murray v. Wilson* the judgment of the inferior Court was one of nonsuit. Whether the alleged cause of action arose or not within the inferior Court is quite immaterial as to a judgment of nonsuit or nonpros. The nonsuit may have proceeded on the very ground that the cause of action did not arise within the jurisdiction. [Lord *Lyndhurst*, C. B.—Suppose a plaintiff in an inferior Court brings his action, and alleges that the cause of action arose within the jurisdiction, which allegation turns out to be unfounded, the plaintiff is nonsuited, and a judgment of nonsuit is entered, awarding costs to the defendant. In a declaration in a superior Court on such a judgment it would not be truly averred that the cause of action in the original suit occurred within the jurisdiction of the inferior Court; and yet it is quite clear that the plaintiff suing upon such a judgment would be entitled to recover.] That is the effect of the case of *Murray v. Wilson*, which has, therefore, no bearing upon the present question. It would be quite absurd, if a plaintiff were properly nonsuited in an inferior Court, to hold that the defendant could have no relief by action on the judgment, because he could not allege that the plaintiff below had brought his

(*a*) 1 Cowper, 20.

(*b*) 1 Salk. 201.

(*c*) 1 Wilson, 317.

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action for a cause of action arising within the jurisdiction. If such averment were necessary, it would impose on the plaintiff in the action on the judgment the necessity of stating a falsehood. It is a fallacy to say that the want of jurisdiction is an objection in such case. It is true that an inferior Court has no right to give judgment for a plaintiff if the cause of action arose out of the jurisdiction; but it has power to give judgment for the defendant, and must do so on the very ground that the cause of action lies out of the jurisdiction, if such appears to be the case in the proceedings below. The other cases cited are no authority in favour of the present plaintiff. *Bentley v. Donnelly* and *Lucking v. Denning*, which have been referred to, were both after verdict; and the Courts may have refused to disturb them, on the well-known principle that after verdict you are to presume what must have been proved to entitle the party to recover. [*Bolland*, B.—In *Bentley v. Donnelly*, Lord Kenyon does not proceed on the ground of its being after verdict.] If this defect is fatal where the allegation is merely matter of inducement, as in the cases cited, where pleas have been held defective for want of such an averment, it is surely of much more importance in a declaration on a judgment where it is the very gist of the action. All the most approved forms contain the averment; and the passage cited from Mr. Serjt. Williams's notes on *Saunders* gives a form containing the allegation.

Lord LYNDHURST, C. B.—I had considered it as quite settled that the declaration in an action on the judgment of an inferior Court must allege that the cause of action arose within the jurisdiction. As it seems, however, to have been omitted in some books of precedents, and is a general question, we will speak to the Judges of the other Courts on the subject.

*Cur. adv. vult.*

On the last day of this term the judgment of the Court was given by Lord LYNDHURST, C. B.:—In the case of *Read v. Pope* the defendant demurred generally to the declaration, which was on a judgment for the plaintiff in an inferior Court. The ground of the demurrer was, that it was not alleged that the cause of action in the original suit arose within the jurisdiction of the Court below. We have spoken to the Judges of the other Courts on the subject, and they concur with us in thinking the defect fatal. The demurrer must therefore be allowed.

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#### Judgment for the defendant.

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#### DIXON v. NUTTALL.

*ASSUMPSIT* on the following promissory note:—"I promise to pay to M. A. D. or bearer, on demand, the sum of 16*l.* at sight, by given up clothes and papers, &c.—N. Nuttall" (a). The declaration averred that the defendant had sight.

At the trial at the Sittings in *Hilary Term* before *Boland*, B., it did not appear that the note had ever been presented, or that the defendant ever saw it after the making of it. A verdict having passed for the plaintiff, with leave to the defendant to move to enter a nonsuit—

A promissory note was made in the following form:—"I promise to pay to M. A. D. or bearer, on demand, the sum of 16*l.* at sight."—*Held*, that no action was maintainable without a presentment for sight.

*Bompas*, Serjt., obtained a rule for that purpose, against which cause was now shewn, by—

(a) It was contended at the trial that the instrument did not amount to a promissory note, on account of the expression "by given up clothes and papers," but the learn-

ed Judge was of opinion that the words in question only meant for value received, and the Court afterwards refused to grant the rule nisi on this point.

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*Milner.*—Taking this instrument altogether, it is not a note payable at sight, but a mere promissory note payable on demand; the words “at sight” are inconsistent with the rest of the note, and may be rejected. The only question on such a note is, whether the three days’ grace are allowable on such an instrument; but that question does not arise in this case, as more than three days elapsed after the making. If sight was necessary, the sight was had at the time of the making. The making of a note is the same as the acceptance of a bill of exchange, and the maker of the one is exactly in the same situation as the acceptor of the other. Now, if a bill be drawn at or after sight, it is not necessary, where it has been accepted, to present it afterwards for sight; the acceptance is sufficient. So, in this case, the maker being the same as the acceptor, the making the note was sight sufficient, and no further presentment for sight was necessary. More than three days elapsed after the making of the note before the bringing the action, and therefore, even if the three days of grace were allowable, the action was not brought until after they had elapsed. But on bills payable at sight these days are not allowed; so, in the case of bank post bills, the Bank pays at the day. [Parke, B.—If that were so, it would be of no assistance to you. You do not shew that there was any presentment or sight.] The sight was had when the note was made. No acceptance of a note is ever necessary. So here, if the note is a note at sight, and the three days were allowable, the moment the defendant signed he had had sight, and was in effect the acceptor; and, even if the three days of grace are allowable, they ran from that time. Nothing remained to be done for which it was necessary that the defendant should have the note again presented to him.

*Bompas, Serjt.*—It was averred in the declaration that the defendant had sight, but that averment was not proved.

In *Holmes v. Kerrison* (a), it was held that no debt accrues on a note payable after sight, until it be presented for payment. That case shews there is a distinction between the acceptor of a bill and the maker of a note payable at or after sight. If the signature of a note was *sight*, it would be immaterial whether it was due after sight or after date. Whether the three days are to be allowed or not, at all events the words "at sight" must be construed to mean that the defendant shall see it before he can be compelled to pay it.

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It is said on the other side that the words "at sight" may be rejected, and then it would be a note payable on demand; but it is just as reasonable to reject the words "on demand," and then it would be a note payable at sight. He was then stopped by the Court.

**PARKE, B.**—We are all agreed. I take it to be a rule that we are not to reject any words to which we can give a meaning. I can give a meaning to those words. The meaning is clear to this extent, that, before the defendant is to be called upon to pay this note, he is to see it. There is nothing in this which is inconsistent with the other part of the note. It is not necessary for us to say whether the three days' grace was to be allowed or not. It was argued by Mr. Milner that the making was sufficient sight; but *Holmes v. Kerrison* is an answer to that, and was a decision that such a note is not to be paid until it is presented. The meaning of this note clearly is, that it is not to be paid until it has been presented to the defendant. If so, as there is no proof of a presentment, it is clear that the plaintiff is not entitled to recover.

**BOLLAND, B.**—*Holmes v. Kerrison* is decisive on this question.

(a) 2 Taunt. 323.

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ALDERSON, B.—The only difficulty I have felt is removed by *Holmes v. Kerrison*. It was put by Mr. Milner that a maker of a note is in the same situation as the acceptor of a bill; but that is fallacious as applied to the present question.

GURNEY, B., concurred.

Rule absolute.

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GREGORY, *qui tam*, *v. TUFFS*.

Where the jury in a penal action have found a verdict for the defendant through a misapprehension of the law, the Court will grant a new trial though the mistake did not proceed from any misdirection of the Judge.

DEBT on stat. 25 Geo. 2, c. 36, for keeping an unlicensed house for music and dancing. Plea—the general issue.

At the trial, at the London Sittings before Lord Lyndhurst, C. B., clear evidence having been given of the facts charged in the declaration, the jury were addressed on the law on behalf of the defendant, and the act of Parliament was read to them. The Chief Baron having explained the law to them, they asked for the act of Parliament, and retired taking it with them. They afterwards found a verdict for the defendant. Follett obtained a rule *misi* for a new trial, against which—

Platt now shewed cause, and contended that it was contrary to practice to grant a new trial in a penal action. *Brook v. Middleton* (a) shews that it cannot be done on the ground of the verdict being against evidence; and in the present case, it is impossible to ascertain that the verdict of the jury has not proceeded on the evidence merely, and that they have not disbelieved the witnesses, who were informers, going about from house to house.

*Follett, contra*, contended, that, if the Court would not grant a new trial in a case like the present, the effect would be to make juries judges of the law in all penal actions. It was clear, from what happened at the trial, that the jury must have proceeded on some mistake as to the law. He cited *Wilson v. Rastall* (*a*), to shew, that, for a mistake in point of law, the Court will grant a new trial in a penal action. He also cited *Rex v. Cohen* (*b*), and the case of the *The King v. Sutton* (*c*), recently decided in the Court of *King's Bench*.

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Lord LYNDHURST, C. B.—There is no doubt, if there be a mistake in the jury through the misdirection of the Judge in point of law, that a new trial may be granted in a penal action. The only ground on which we would do it here would be, the conviction in our minds that the jury have formed their verdict on a misapprehension of the law. There seems to me at present to be no difference whether the mistake, if in point of law, has proceeded from the Judge or not. The first question is, are we perfectly satisfied that the jury did proceed on a mistake of the law? That is a question of fact for our determination. The second question is, whether such mistake of the jury, not occasioned by the misdirection of the Judge, is a ground for a new trial in a penal action. This is a general question, and we will mention it to the Judges of the other Courts.

*Cur. adv. vult.*

On a subsequent day the judgment of the Court was delivered by Lord LYNDHURST, C. B.:—This was a penal action in which the jury found a verdict for the defendant. It is not usual where a verdict has been found for a de-

(*a*) 4 T. R. 753.      (*b*) 1 Stark. N. P. C. 511; and see note cited, *Id.*  
                           (*c*) 5 B. & Ad. 52.

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defendant in a penal action to grant a new trial, on account of the verdict being against the evidence; but, whenever there has been a misdirection in point of law by the Judge who presided, it is a matter of course that a new trial should be granted, because the jury have been misled by the Judge in point of law. If, however, the jury are misled in point of law by any other means, there seems to be no reason why their mistake in point of law should not be corrected. In the present case, we are satisfied from the circumstances that the jury have acted on a misapprehension of the law. The clearness of the evidence on the part of the plaintiff—there being no evidence on the defendant's side—the conduct of the jury, and their asking for and taking with them a copy of the act of Parliament—have led us to the conclusion that the verdict of the jury in this case was not founded on their opinion of the facts of the case, but upon a mistake of the law. We have conferred with the other Judges upon the subject, and they agree with us, that, under such circumstances, there ought to be a new trial.

Rule absolute for a new trial.



### STRUXT and Others v. SMITH.

Goods were sold upon the following terms:—"7½ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days:"—*Held*, that the vendors could not sue in *indebitatus assumpsit* for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained for the goods.

**I**NDEBITATUS *assumpsit* for goods sold. Plea—the general issue. At the trial at the London Sittings after Michaelmas Term, before Gurney, B., it appeared that the plaintiffs, who were manufacturers at Derby, had sold the goods in question to the defendant, who had induced them to sell the goods under circumstances which, as the plaintiffs contended, amounted to fraud, and they, therefore, within fourteen days from the time of sale, held the defendant to bail, and declared in *indebitatus assumpsit*.

The terms on this and one or two previous occasions on

which the defendant had dealt with the plaintiffs, were contained in a printed paper setting forth a list of the different articles manufactured and sold by the plaintiffs, with their prices, and at the top were printed the terms of credit as follows:—"Prices of cotton yarns &c., sold &c.—7½ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days." (Then followed the list of prices). The jury found a verdict for the plaintiffs for the whole price of the goods, with liberty to the defendant to move to enter a nonsuit, if the Court thought the action was brought prematurely; and to reduce the verdict by the amount of the discount, if the Court should be of opinion that the action was maintainable, but that the discount ought to have been allowed. The jury found that the defendant did not intend to avail himself of the 10 per cent. discount, but meant to take the longer credit.

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*Bompas, Serjt.*, having obtained a rule accordingly—

*Busby* shewed cause:—As to the question of reducing the verdict, the finding of the jury that the defendant did not intend to avail himself of the discount is decisive. The other question is, whether the action has been brought prematurely. It is submitted that here the whole transaction was one of fraud, and that the party cannot take advantage of his own fraud, so as to set up a credit, the terms of which have only been acceded to by the vendors through the fraudulent conduct of the purchaser. [*Parke, B.*—The difficulty is, that, if you meant to treat it as a fraud, you should have brought trover. If you treat it as a contract, you must treat it so altogether. *Ferguson v. Carrington* (*a*) decides, that, where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he might have maintained trover. That case is applicable if the contract was

*Exch. of Pleas,* to pay a less sum than the real price, if cash was paid at  
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the end of fourteen days, and an intermediate sum if a bill at three months were given. Still, it is difficult to say what the exact contract was; it is not stated in the terms what the credit was to be if the cash was not paid at the end of fourteen days, and a bill was not given. *Alderson*, B.—The difficulty is, whether we can see any distinct contract for a specified credit. *Gurney*, B.—The contract seems to be, “We take off 10 per cent. if you pay cash in fourteen days. If you pay in a bill at three months we take off 7½ per cent.”] It is submitted there was no distinct contract for any precise credit, and that there was nothing to prevent the plaintiffs from suing immediately on the discovery of the fraud for the price of the goods, as for goods sold generally, without any specified credit.

*Bompas*, Serjt., and *Kelly*, contrà.—The credit was clearly in the option of the defendant. [ *Parke*, B.—Then, might he take an unlimited credit, if he did not pay cash in fourteen days or give a bill?] The defendant had at least fourteen days, even if he had not the option as to the subsequent credit. The plaintiffs clearly had no option to exclude the credit, so as to sue before the expiration of the fourteen days. [ *Parke*, B.—Suppose that you were declaring specially on this contract, how would you state it? What is the credit in legal language? When the goods were purchased some contract must have existed; now, what is that contract in legal language?] That, in consideration of the sale and delivery of the goods, the defendant undertook either to pay in cash in fourteen days, deducting 10 per cent. discount, or by a bill at three months, deducting discount at 7½ per cent.; or, if he did not pay in either of those ways, then to pay the whole, either according to the course and usage of the trade, which would probably determine the credit, or, perhaps, to pay the whole immediately on failure to give the bill. But, whether he was to pay the

whole immediately on failure to give the bill, or whether the last alternative was to be a credit according to the usage of the trade, is immaterial; for, even supposing that the whole was to be due in cash on the failure to give the bill, still the plaintiff could not sue until the expiration of the fourteen days. Whatever construction, therefore, may be put on the contract as to the credit, if the bill were not given, it is quite clear that the defendant was not bound to elect within the fourteen days whether or no he would give cash, and he had the whole of the fourteen days to decide whether he would take the credit or not. The bringing the action within the fourteen days was therefore premature.

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PARKE, B.—It is clear that the plaintiffs cannot avail themselves of the defendant's] fraud so as to rescind the contract, and substitute a new contract of sale on different terms. They might possibly on the evidence have maintained trover, on the ground that the fraud vitiated the contract ; but, if they treat the transaction as a contract at all, they must take the contract altogether, and be bound by the specified terms. That was rightly decided in *Ferguson v. Carrington*. Then, the question here is, what was the contract? There is some obscurity attending it; but we can see clearly that the defendant had fourteen days in which he had the choice either to pay cash at the end of that time, or to pay by a bill; and the jury have found that he availed himself of his option to take the credit. He was not, therefore, bound within the fourteen days to pay upon request. The declaration is framed upon the supposition that the defendant was indebted in a sum of money payable upon request. Now, as the defendant had an option until the expiration of the fourteen days to pay in cash or by a bill, it is clear, that, during the fourteen days, he was not liable to pay on request, and, therefore, that this declaration

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ALDERSON, B.—I am of the same opinion. The printed paper seems to have been a sort of offer by the plaintiffs, saying—We will either deal with you on the terms of your paying in cash at the end of fourteen days, or on the terms of your giving a bill at three months. The difficulty on the terms was, as to what would be the credit if the cash were not paid and the bill were not given; but we need not determine that, as the plaintiffs have sued within the fourteen days during which the defendant had a right to consider whether he would pay in cash or take the credit. This the plaintiffs clearly had no right to do, and therefore the rule for a nonsuit must be made absolute.

The rest of the Court concurred.

Rule absolute for entering a nonsuit.

JESSE, Administrator of Jesse, Deceased, v. ROY and  
 THOMPSON, Executors of SMITH.

A seaman entered into articles of agreement to serve on board a ship

"bound from the port of *London* to the *South Seas* to procure a cargo of sperm oil, and to return therewith to the port of *London*, where the voyage was to end," and he was to receive, in lieu of wages, a 95th share of the net proceeds of the cargo. By the 6th article of the agreement it was stipulated, that "no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at *London*, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles." The vessel sailed upon the voyage and procured a cargo; but, on her voyage home, was disabled and condemned in a foreign port. The cargo was transhipped, and, with the exception of a small portion sold for repairs, was delivered in *London*, and the freight upon it paid. The seaman accompanied the cargo in the vessel to which it was transhipped, but died before it reached *London*:—*Held*, that the representatives of the seaman were not entitled to his share of the proceeds of the cargo under the agreement, but only to a *quaque mersit* for his services on board the second vessel.

a vessel employed in the whale fishery, to recover the value of one 95th share of a cargo of sperm oil. At the trial before *Bayley, B.*, at the *Summer Assizes for Surrey*, a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated—

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That, on the 22nd of June, 1829, the plaintiff's intestate, *Jonathan Arrowgate Wilson Jesse*, duly executed the articles set forth in the declaration, with the defendants' factor, *William Smith*, who was the sole owner of the ship *Royalist*. That *Jesse* entered on board the ship as one of the crew, and sailed with the ship from the port of *London* on or about the 23rd of the same month of June upon the voyage mentioned in the articles, under the command of *Thomas Steven Harris*. The ship was seaworthy when she set sail, and, during the course of her voyage, the crew obtained the various quantities of oil hereinafter mentioned, partly in the lifetime of the said *William Smith*, and partly after his death; and that 22 tons of oil, parcel of the quantities produced as hereinafter mentioned, were taken out of the ship and disposed of by the master to Messrs. *Kierulf & Co.*, of *Manilla*, for payment of necessary repairs of the ship, and for stores and other expenses, as mentioned and explained in the log-book, a copy of which is annexed to this case. That the gross value of the 22 tons of oil, according to the market price at *Manilla* on the 1st of January, 1832, was £. That the gross proceeds arising from the sale of the 22 tons of oil, which were forwarded to *London* to be sold for the account and at the risk of the owner of the *Royalist*, amounted to 580*l.* 16*s.* 8*d.*, and the value of the said 22 tons when taken out of the ship, at the market price in *London*, was 62*l.* per ton, or 1364*l.* That the said ship *Royalist* obtained on her voyage, in the whole, 244 tons of 252 gallons each, imperial measure, or thereabouts; but that from the accidents the said ship met with at sea, and from tempestuous weather, not less than 71 tons were lost.

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by leakage. That, in consequence of other more serious sea damage, the said ship *Royalist* became unfit for further repair; and was legally condemned, with the sanction of the said *Thomas Steven Harris*, at *Ternate*, in the island of *Timor*, on or about the 5th day of *August*, 1832, where she was sold and ultimately broken up by the purchaser. That the said ship, tackle, stores, &c., produced by sale 8488 guilders, or 700*l.* sterling. That the following is a copy of the survey held on the vessel, prior to which the cargo remaining on board was taken out. [Here the case set out the survey] That such last-mentioned cargo consisted (exclusive of the oil lost by leakage, and exclusive of the said 22 tons, or thereabouts, aforesaid) of 148 tons, whereof 122 tons were, by the order of the said *Thomas Steven Harris*, shipped in the brig *Hope*, from *Ternate* to *Batavia*; and that at *Batavia* the said 122 tons were transhipped to and on board the *Alexander*, of *London*, which duly arrived at *London*; and these 122 tons, after deducting the leakage thereon during the homeward voyage, produced 91 tons of oil, net, which were sold and delivered, and the proceeds received by the defendants before the commencement of this action. That the account sales of these 91 tons, which produced 461*3l.* 15*s.* 2*d.* gross, may be read. That the freight paid for the said oil *per the ship Hope*, and the charges on the said oil at *Batavia*, amounted to 666*l.*, and the freight *per ship Alexander* amounted to 102*2l.* That 26 tons, the remainder of the said cargo, were carried in the ship —, by order of the said Captain *Thomas Steven Harris*, from *Ternate* to *Manilla*, and were shipped by the like order in the *Planter*, for *London*. That the freight of the last-mentioned oil from *Ternate* to *Manilla*, and the charges then paid thereon, was 134*l.*, and from *Manilla* to *England*, *per Planter*, 218*l.* That the defendants will duly account for the proceeds of the sale of the said oil *per Planter*, if and when received, and be bound

to distribute the same in such manner as the judgment of this Court shall direct, with reference to the proceeds of the oil *per Alexander*, now in hand.

That the said Captain *Thomas Steven Harris* was satisfied with the conduct of his officers and crew, and gave to the said *Jonathan Arrowgate Wilson Jesse*, deceased, by the name of *Jonathan Jesse*, and others of the crew, certain certificates dated at *Ternate*, in or about the month of *August*, 1832. That the said *Jonathan Arrowgate Wilson Jesse's* certificate be considered for the purposes of this action as follows, (the original having been lost by him at sea) : "This is to certify that *Jonathan Jesse* has served as cooper's mate on board the ship *Royalist*, from the 21st *June*, 1829, until the 5th *August*, 1832, when the said ship was condemned as unfit for sea, and is entitled to the 95th share of 22 tons of sperm oil sent home from *Manilla*, also of 122 tons shipped on board the brig *Hope* for *Java*, and of 26 tons remaining in *Ternate*, after deducting slop bills and usual expenses. Dated in *Ternate*, 5th *August*, 1832. Signed *Thomas S. Harris*, master, ship *Royalist*." That the said *Jonathan Arrowgate Wilson Jesse*, deceased, *John Nesbitt*, the cooper, and *David Higgins*, the chief officer, all engaged and serving on board the said ship *Royalist*, attended to the discharging the said cargo at *Ternate*, to the re-coopering of the said cargo, and to the shipping the same on board the *Hope* and *Alexander*. That the said *John Nesbitt*, the cooper, remained by the cargo of the said ship for four or five months after the condemnation thereof; and that the said *Jonathan Arrowgate Wilson Jesse*, and the said *David Higgins*, actually shipped themselves on board the said ship *Alexander*, for the purpose of attending to the said *Royalist's* cargo then on board; but that the said *Jonathan Arrowgate Wilson Jesse* died on the 27th *October*, 1832, on board that ship on his homeward passage, not having any wages or other remuneration for his services on board thereof. That the said

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*Fact. of Pleas.*, *David Higgins* arrived with the said ship *Alexander* in  
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 the port of *London*. That no desertion or forfeiture took  
 place during the voyage. That the said late *William Smith*, deceased, effected insurances on his said ship *Royalist* and her stores to the amount of 5,000*l.*; and that the defendants also effected insurances upon the said ship to the extent of 2,050*l.*, and, upon the cargo of oil obtained during the voyage, to the amount of 9,000*l.* That the said defendants have caused to be made up the following statement of the loss on oil to be recovered on the policies on oil, and which loss has been paid to the defendants. [Here the case set out the statement.] That the said *William Smith* departed this life on or about the *November*, 1830, having first duly made his last will and testament, whereby he appointed the said defendants his executors, who duly proved the same in the proper Ecclesiastical Court, on or about the *December*, 1830. That the said *Jonathan Arrowgate Wilson Jesse*, deceased, died intestate; and that the said plaintiff hath duly obtained letters of administration, dated the 6th *June*, 1833. That the said *Thomas S. Harris* remains in parts beyond the seas. That the tons of oil throughout these admissions be taken as tons of 252 gallons each, imperial measure.

"The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover the 95th lay or share upon the 22 tons of sperm oil, and the 148 tons, or upon either quantities, or any part thereof; and if upon the 22 tons only, then at what price pert on: or, if not to any portion of the oil—Whether or not the intestate is entitled to a *quantum meruit* for services rendered on board the *Royalist*, and for assisting the unloading and re-shipment and conveyance of the 148 tons of oil from the *Royalist* on board the other two ships in the manner stated in the case. And if the plaintiff is entitled to the lay or share upon the 148 tons, whether or not such lay or share is subject to any portion of freight and expenses

in bringing home the same in the two ships mentioned in the case. The verdict to be altered and entered for the plaintiff or defendants as the Court shall direct. If the verdict is directed to stand for the plaintiff, the amount of debt shall be settled out of Court, according to the determination and direction of the Court as to the extent of the plaintiff's claim."

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The articles referred to in the case were as follows:—

"That, in consideration of the share against each person's name hereinafter written, of the net and clear proceeds of the cargo which shall or may be procured and brought in the said ship or vessel to *London*, they, the said master, officers, and crew (each agreeing for himself only), do hereby promise, declare, and agree to and with the said owner, that they, the said master, officers, and crew, shall and will well and truly perform the above-mentioned voyage, and do their duty, and obey the orders and commands of their superior officers, and conduct themselves at all times and upon all occasions, and in all ports and places the said ship may touch or call at in the course of her said intended voyage, with sobriety, and as good and faithful seamen and mariners ought to do, as well on board the said ship as in her boats or on shore, and shall and will exert themselves and use their best endeavours to procure for the said ship a full cargo of the produce of the *South Seas*, with the greatest expedition, and conduct her therewith with proper care and attention to the said port of *London*, where the said intended voyage is to end. That no one of the said officers and crew shall absent himself from the said ship, or from his duty at any time during the said intended voyage, without first obtaining a ticket of liberty from the commanding officer of the said ship or vessel for the time being, for some certain time to be therein expressed, which, on no pretence, shall be exceeded by the person to whom the same shall be given or

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granted. That the master, officers, and crew of the said ship or vessel shall and will stand by the said ship or vessel in all ports and places, seas and dangers, and shall and will at all times use and exert their utmost skill and ability for the preservation of the said ship or vessel, and her boats, tackle, apparel, furniture, stores, and cargo, until she shall have arrived back at the port of *London*, and her cargo shall be there wholly discharged. That no one of the said officers and crew shall neglect or refuse to do his duty by day or night, nor shall go out of the said ship or vessel, under any pretence whatsoever, until the said intended voyage shall be ended, and the said ship or vessel wholly discharged of her cargo, without obtaining a ticket of liberty as before mentioned. That each and every lawful command which the master and commanding officer of the said ship or vessel for the time being shall think necessary to issue for the effectual government of the said ship or vessel, or for suppressing immorality and vice of all kinds, shall be strictly attended to and complied with. That no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo, *until the arrival of the said ship or vessel at London*, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner, nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles. That, in ascertaining the net proceeds of the said cargo upon the completion of the said voyage, there shall be charged by the owner in respect of sperm oil and head matter ten pounds per ton imperial measure, upon the gross amount of the sales thereof, in lieu of casks, landing, delivery, lighterage, cooperage, wharfage, common discount, and other charges usually made by owners in this trade; and in respect of all other oil, eight pounds per ton imperial measure; and in respect of ambergris and seal skins, the duty and all other usual

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expenses. That every one of the said officers and crew who shall not return in the said ship or vessel, with her cargo, to *London*, (except in the case of death as after-mentioned), or who shall desert from the said ship or vessel, or who shall enter on board any of his majesty's ships or vessels of war without the consent of the master or commanding officer of the said ship or vessel the *Royalist*, for the time being, or who shall break or neglect or refuse to perform these articles, or any of the engagements or agreements herein contained, in any respect whatsoever, or who shall plunder, embezzle, destroy, or make away with anything on board of or belonging to the said ship or vessel, or to the owner, master, officers, or crew thereof, or any or either of them, or otherwise misconduct himself, shall thereby forfeit the whole of his share of the said cargo, and all his claim and right thereto, and all benefit and advantage accruing or to accrue to him therefrom, and also his chest, clothes, bedding, and effects which he shall have on board the said ship or vessel, and all benefit from the said voyage, any law, custom, or usage to the contrary thereof in anywise notwithstanding. That the said owner shall and may, and he is hereby authorized and empowered to sell and dispose of the said cargo, or any part thereof, at any time or times, and for any price or prices, and upon such terms and conditions as he shall think fit, and either upon credit or otherwise, and either at any time before or after the arrival of the said ship or vessel in the port of *London*; and by such sale or sales they, the said master, officers, and crew agree to be bound. That the said owner shall and may, and he is hereby authorized and empowered to deduct from each person's share of the net proceeds of the said cargo, all such sum and sums of money as he may owe or be indebted to the said owner, or to the master or commanding officer of the said ship or vessel for the time being, for advance money and legal interest thereon, clothes, or any other necessities, at the usual and accustomed prices charged to seamen

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That in case of the death of either of the said officers and crew, the executors or administrators of the party so dying shall not be entitled to more than the deceased's part or share of the net proceeds of such part of the said cargo as shall have been obtained whilst the deceased party was living and personally acting and serving in his proper capacity on board the said ship or vessel. That no person who shall execute these articles shall have, claim, or demand, under any pretence whatsoever, any monthly or other wages, pay, or recompense whatsoever for performing the said intended voyage, or any service on board the said ship, or in her boats, or on shore, save and except his share of the net proceeds of the said cargo to accrue to him under these articles.

The case was argued in *Easter Term*, by *Comyn* for the plaintiff, and *Shee* for the defendant, when the Court directed a second argument.

*Comyn* for the plaintiff.—The first question proposed for the opinion of the Court is, whether the plaintiff is entitled to recover the 95th part or share upon the 22 tons of sperm oil and the 148 tons, or upon either quantities? The plaintiff was entitled. Freight is earned, where a ship has been disabled, but repaired, and is willing to proceed on the voyage. *Luke v. Lyde* (a). In *Hunter v. Prinsep* (b), Lord *Ellenborough* says, "If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination." Freight is the mother of wages, and if the ship-owner is entitled to freight, the seaman is entitled to his wages. It appears from the above authorities, that a change in the ship does not induce a forfeiture of freight, neither then

(a) 2 Burr. 882.

(b) 10 East, 394.

can it a forfeiture of wages. [Lord *Lyndhurst*, C. B.— Does it follow, that because the cargo is saved and put into another vessel, and freight earned, that therefore the seamen must be entitled to their wages?] If they follow the cargo and are the instruments by which the freight is earned, they will be so entitled; and it is a reason for holding them so entitled that they cannot insure their wages. *Webster v. De Tastet* (a). [Lord *Lyndhurst*, C.B.— That argument would be equally applicable to the case of a total loss.] It is said by Lord *Tenterden* in his Treatise on Shipping (b), that, in the case of shipwreck, it is the duty of seamen to exert themselves to the utmost to save as much as possible of the vessel and cargo; and that if the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle that the seamen are also entitled to a proportion of their wages; and this is expressly directed by the French Ordinance. Upon the disability of the ship, is the seaman released from all duties with regard to the ship and cargo? Does that circumstance put an end to all his rights and obligations? Is he not bound to use every exertion to save both the cargo and the vessel? He is entitled, if not bound, to assist in the duty of transhipping the cargo; yet, notwithstanding these obligations, it is contended that he shall have no claim to wages. Where a ship had been stranded and sold for more than sufficient to pay the wages of the seamen, although no part of the cargo was saved, upon a suit for wages in the *Admiralty Court*, Lord *Stowell*, after reviewing the several foreign authorities on the subject, admitted the claim of the seamen, who thereupon received their wages from the owners (c).

The defendants rely upon the sixth article of the agreement, which provides that no one of the said officers and

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(a) 7 T. R. 157.

(b) P. 451.

(c) *Neptune*, Hagg. A.R. 227;

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crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at *London*, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have fully and truly performed the last-mentioned voyage according to the true intent and meaning of the articles. This, however, is nothing more than the common clause to be found in all articles of agreement between the masters and mariners of a vessel, as may be seen from the form given in the Appendix to Lord *Tenterden's* Treatise (*a*). The clause must be construed, not by itself, but in connexion with all the other parts of the agreement, from which the general intent of the parties is to be gathered. It is a well established rule that the words of all instruments are to be liberally construed to serve the intent of the parties, *Com. Dig.* Condition (E); and it is sufficient if the substance, even of a condition, is performed. *Id.* (G 14). What was the object of the parties to this agreement? Was it not that a cargo of oil should be conveyed to *London*? and, although the stipulations in the agreement all refer to the "said ship," it was never intended that if that ship should be disabled from carrying the cargo, it might not be delivered by another vessel. All contracts of this kind must be understood with that reasonable latitude which provides for the occurrence of inevitable accidents. Thus, in *Beale v. Thompson* (*b*), where the stipulation by the seaman was, that he should not be on shore on any pretence whatsoever till the said voyage should be ended and the ship discharged of her cargo, without leave first obtained, it was held that the seaman was entitled to his wages, notwithstanding his having been imprisoned on shore for six months by the orders of a foreign power. [Lord *Lindhurst*, C. B.—The difficulty is, to give a different meaning

to the terms of the contract than they bear upon the face of it. In *Appleby v. Dods* (a), the Court decided upon the terms of the contract.] In that case the ship was bound for the ports of *Madeira*, any of the *West India Islands*, and *Jamaica*, and to return to *London*; and it was agreed that the seamen should not demand or be entitled to their wages, or any part thereof, until the arrival of the ship at the port of discharge, and it was held, that, the vessel being lost on her passage home, the seamen were not entitled to their wages, though freight had been earned on the outward-bound voyage. Lord *Ellenborough* in that case founded his construction of the articles upon the policy of the statute 37 Geo. 3, c. 73 (b), but Lord *Stowell* has since decided that that act applies only to *West India* voyages. Lord *Stowell* appears to have been of opinion that the judgment in *Appleby v. Dods* is only to be sustained on that ground. "I think it is clear," he observes, "from this, that his Lordship calls in this particular act as supplemental and auxiliary to this construction, and that he makes the intent of this stipulation to be *without doubt* the enforcement of the policy of the *West India* Act. But you cannot associate this policy with the *East India* voyage which has nothing to do either with its preamble or its provisions against *West India* desertions, for which purpose alone, as his Lordship asserts, the parties wanted the stipulation, and which therefore I presume he would not be inclined so to construe and apply when no such purpose was in contemplation." The case of the *Juliana* is a strong

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(a) 8 East, 300.

(b) An act to prevent the desertion of seamen from British merchant ships trading to his Majesty's colonies and plantations in the *West Indies*. It recites that seamen and mariners, after entering into articles to serve on

board British merchant ships during the voyage from *Great Britain* to his Majesty's colonies and plantations in the *West Indies* and back to *Great Britain*, frequently desert in such colonies; and it enacts, that every seaman deserting shall forfeit all his wages.

*Exch. of Pleas*, authority for the plaintiff (*a*). That was a case of a divided voyage, where freight was earned outwards; and on the ground of freight having been earned, Lord *Stowell* held the mariners entitled to recover after the loss of the ship before her return home, notwithstanding a covenant that the mariners should not be entitled to any part of their wages unless the ship returned to her last port of discharge. This decision is in accordance with the cases decided in the common law Courts, and even with *Appleby v. Dods* as explained by Lord *Stowell*. One of the earliest, and what is termed by his Lordship, "the great leading case in the common law," is an anonymous case in Lord *Raymond's Reports* (*b*), where Lord *Holt* said, that if a ship be lost before the first port of delivery, then the seamen lose their wages, but if after she has been at the first port of delivery, then they lose only those from the last port of delivery. This case, which was recognised by Mr. Justice *Lawrence* in *Appleby v. Dods*, was the foundation of proceedings in Chancery, reported in *Vernon* (*c*) under the name of *Edwards v. Child*. From that book the case appears to have been this—The Captain took bonds from the seamen when he hired them, not to demand any wages till the return of the ship to London, and not to demand any wages if she was lost before her return. The ship sailed to *Bengal* and delivered her cargo, but was captured on the homeward voyage. The captain was sued for the wages that became due at *Bengal*; and though the bonds were given in evidence in the action tried before *Holt*, C. J., yet the mariners recovered their wages. The captain having paid the wages of the seamen, the bill in equity was filed by the representatives of the cap-

(*a*) As to the authority of the Admiralty decisions in Courts of common law, see what is said by Lord *Stowell*, *Id.* p. 515.

(*b*) Lord *Raymond*, 639; *see also* p. 739.

(*c*) 2 *Vern.* 727.

tain to recover the amount, and the Lord Chancellor decreed accordingly; which, to use the language of Lord *Stowell* (a), was a strong affirmation of the equity of Lord *Holt's* decision. The rule of the *Scotch* law is likewise cited by the learned Judge who decided the case of the *Julianna*, as confirmatory of the principle there laid down. He referred to the case of *Morrison v. Hamilton* (b) as shewing a contract so worded to be only a suspension of the demand, and not a limitation of the right. [Upon the point as to the right of the plaintiff to recover upon the *quantum meruit*, the Court expressed a strong opinion in the affirmative.] With regard to the last point, the amount of wages payable to a seaman cannot depend upon the amount of money expended in the repairing of the ship, and here the amount of the proportion of the cargo due to him cannot be affected by the circumstance of the 22 tons of oil having been sold to pay the expense of repairs.

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*Shee*, for the defendant.—The plaintiff cannot claim to recover upon the *quantum meruit* consistently with the articles of agreement, which exclude such a claim. If he shapes his case in that manner he must abandon his claim upon the articles. [Lord *Lyndhurst*, C. B.—If your construction of the articles be right, all claim upon them was at an end, and the mariner was at liberty to make a fresh engagement with the captain.] While there is a written contract in existence no implied contract can arise; and the plaintiff contends that the written contract continued to operate notwithstanding the loss, and that under it the seaman was entitled to wages for bringing home the cargo. [Lord *Lyndhurst*, C. B.—The plaintiff only says, if the written contract is subsisting, then I claim under it; if not and it is at an end, then I claim upon the *quantum meruit*.] If the voyage be the same, the last clause of the articles

(a) 2 Dods. 517.

(b) 1 Bell's Com. 515.

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applies which prohibits the seamen from claiming any monthly or other wages, pay, or recompense whatever for performing the intended voyage. It is correctly stated on the other side, that, in order to arrive at the proper construction of the clause in question, it is necessary to consider the whole of the instrument, and thence to gather the intent of those who were parties to it. It is a rule in most cases, "*quoties in verbis nulla est ambiguitas, ibi nulla exppositio contra verba expressa fienda est.*" In a late case of *Carstairs v. Rickman* (*a*), before Lord *Denman*, at *Nisi Prius*, it appeared that there was no doubt in fact that a policy was intended to protect a vessel on her outward bound voyage to *Africa*, but, as the intention did not plainly appear on the face of the policy, the Court would not give effect to it; and it was said that not what the parties might have intended but what they had actually said must govern the construction. It is for the very purpose of preventing such doubts with regard to construction that the contracts with seamen are directed by statute (*b*) to be in writing, "in order to prevent the mischiefs that frequently arise from the want of proof of the precise terms upon which seamen engage to perform their services in merchant ships" (*c*). To arrive at the proper construction of the 6th clause of the articles, it must be read in conjunction with the 7th and the 12th. In the 6th clause the word "until" must be read "unless"—[Lord *Lyndhurst*, C. B.—If read *unless*, observe what follows.—That word must apply to the succeeding part of the clause, and the seamen would not be entitled to demand any share of the net proceeds *unless* the cargo should be sold and delivered *there* (at *London*), and the money actually received by the owners. Now, by the 9th article, the owners are authorized to dispose of the cargo at any time before or after the arrival of the ship at

(*a*) Reported in *Banc*, 2 N. & M. 562.      (*b*) 2 Geo 2, c. 36, s. 51.

(*c*) Abb. on *Ship*. 435, 5th ed.

the port of *London*. Suppose, then, that they do not sell the cargo at the port of *London*, will that deprive the seamen of their right to demand wages? The two clauses may be reconciled, if the former is held only to define the time.] The 9th clause is an exception, and does not prevent the 6th clause from operating as a conditional one. [*Vaughan*, B.—The 9th clause appears to have been inserted in order to give the power of anticipating the sale and getting a good market, even before the ship arrives.] The 7th article contemplates the completion of the voyage as a condition precedent to the distribution of the proceeds. It states that "in ascertaining the net proceeds of the said cargo, upon the completion of the said voyage, there shall be charged," &c. No provision is to be found in any part of the instrument with reference to a loss of the vessel. The first five articles apply to the liabilities and duties of the mariners on board the ship *Royalist* only. [*Gurney*, B.—The contract of the seamen only applies to the vessel in which they embark.] It is said that seamen cannot insure their wages; and that, while the owners may protect their interest in the freight, the mariners must, in case of loss, be wholly deprived of their wages. Here it is not a claim for wages, and there is no reason for saying that the seamen might not insure their share of the cargo. The object of the mode of remuneration adopted in whaling voyages is to secure, not merely hired servants, but persons who, by participating in the adventure, and being entitled to share in the profits, may have a peculiar interest in bringing the ship safely home. It is a hazardous service, and the risk is shared amongst all the parties. The object of the owners is the safety of the ship, to insure which they render the remuneration of the mariners dependent on her return in safety. If the construction contended for by the plaintiff is to prevail, the Court must erase the words "in the said ship or vessel to *London*," in the first article, and in the sixth, instead of the words

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must be inserted "until the arrival of the said cargo or any part thereof." The construction of the agreement contended for by the defendant is consistent with the principle of law which will not permit the wages of mariners to be insured, in order to secure their best exertions in providing for the safety of the vessel committed to them; nor can it be pretended that there is any particular hardship or oppression in this stipulation. It is the voluntary act of the seamen themselves, who choose to run the risk for the sake of the gain; and it is a condition not only to be found in the articles of *English* seamen, but in those of other countries. The fishers in *Holland* and *West Friesland* enter into such articles, and consider it no hardship (a). The hardship of the case is not greater here than in the common case of freight, where, unless the vessel arrives, the freight is lost. Thus, in *Cook v. Jennings* (b), where the freight was to be paid on the arrival of the vessel at the port of discharge, and she was lost on the homeward voyage, Lord *Kenyon* said, "The question is whether the owner can enforce payment of the money under that contract, not having carried the goods to *Liverpool*, and the defendant having only undertaken to pay on their delivery at *Liverpool*. In answer to this action the defendant has a right to say, '*Non hæc in fædera veni.*'" *Bright v. Couper* (c) is to the same effect. Then it is said that the owner may indemnify himself against the loss of the freight. So he may, but he buys that indemnity with his money. The mariner retains his money, and is not indemnified. As to the argument that the stipulation in the sixth article is illegal, that article goes no further than the rule of the law merchant. Upon the principle cited on the other side, that freight is the mother of wages, the article is valid.

(a) See *Scoreby's Voyage*, Vol. 11, p. 212. (b) 7 T. R. 381.

(c) 1 *Brownlow*, 21; *Abbott on Ship*. 319.

It merely provides that if the ship does not arrive in safety at *London*, her port of discharge, no remuneration shall be gained by the mariner. Unless she did arrive safely at the port of *London*, neither would any freight be earned. There are many authorities to shew that such a stipulation as this is legal. It is said in *Mollov* (a) that if the ship perishes at sea the mariners lose their wages and the owners their freight, and that this, being the marine custom, is allowed by the common law as well as by the civil law. So, upon a motion for a prohibition, it was agreed that if the ship do not return, but is lost by tempest, enemies, fire, &c., the mariners shall lose their wages, for, otherwise, they will not use their best endeavours, nor hazard their lives to save the ship—*Anon.* (b). In *Abernethy v. Landale* (c) it was held that an officer or sailor who had engaged to serve on board a letter of marque for certain wages during the voyage and a share of all prizes, was not entitled to any part of the wages where the ship was taken before she completed her voyage, although he had been sent from the ship before the capture, as prize-master on board a ship taken in the course of the voyage. Lord *Mansfield* says—“As a sailor on board a ship on a sailing voyage, the plaintiff is entitled to nothing, for freight is the mother of wages, and the safety of the ship the mother of freight. The question is whether he can now make any claim in the nature of wages for the time he had the care of the prize; and the light in which it strikes us is this—the ship sets out in a double capacity, she is to perform a trading voyage and is to carry negroes from *Africa* to *America*; but, before that, she is to cruize for three months as a privateer. All demand on account of the trading voyage is gone; but, in her character of a pri-

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- (a) 2 *Mollov*, c. 3, s. 9, cited 235 (A. 2) 15.  
15 *Vin. Ab.* 235 (A. 2) 11. (c) 2 *Dougl.* 539.  
(b) 1 *Sid.* 179; 15 *Vin. Ab.*

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 vateer, the crew are entitled to no wages. They all run  
 equal risks, and the chance of their respective shares in  
 prizes." In *Cutter v. Powell* (*a*) it was held that where a  
 sailor hired for a voyage took a promissory note from his  
 employer for a certain sum, provided he proceeded, contin-  
 ued, and did his duty on board during the voyage, and  
 died before the termination of the voyage, his represen-  
 tative could not claim anything for wages. If ever there  
 existed a case of hardship, it was this; but the Court  
 decided the case upon the clear meaning of the contract  
 between the parties. Mr. Justice *Ashhurst* says—"Here  
 the intestate was, by the terms of his contract, to per-  
 form a given duty before he could call upon the defen-  
 dant to pay him anything; it was a condition precedent,  
 without performing which the defendant is not liable.  
 And that seems to me to conclude the question. The  
 intestate did not perform the contract on his part; he  
 was not, indeed, to blame for not doing it, but still, as  
 there was a condition precedent, and he did not per-  
 form it, his representatives are not entitled to recover."  
 So, upon a voyage to *Newfoundland*, to take in a cargo,  
 and thence to *Spain*, *Portugal*, or some part of the *Mediterranean*, the ship being captured after loading at *New-  
 foundland*, it was held that neither freight nor wages were  
 earned—*Hernaman v. Bawden* (*b*). But the later case of  
*Appleby v. Dods* is the strongest on the subject, and is  
 conclusive in favour of the defendant. That was the case  
 of a divided voyage, and freight for the first part had been  
 earned, while here no freight had been earned at the time  
 of the loss. In *Appleby v. Dods*, therefore, wages would  
 have been payable had it not been for the express prohi-  
 bition contained in the contract. It has been attempted  
 to be shewn that Lord *Ellenborough's* judgment in that  
 case proceeded upon the policy of the statute 37 *Geo.*

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3, c. 73; but no such inference can properly be drawn from the language used by him, which shews that the decision was founded upon the construction of the contract itself. [Vaughan, B.—The articles are in a schedule to the statute 37 Geo. 3.] A similar form is given in Abbott on Shipping (*a*), which form is generally adopted. The case of *Beale v. Thompson* (*b*), is clearly distinguishable. There freight was earned, and the absence of the seaman was involuntary. Upon the question of the illegality of a stipulation like that contained in the sixth article, the judgment of Lord Stowell, in the case of the *Juliana*, has been much relied upon; and it will therefore be necessary to examine the grounds of that judgment, and to see whether it can be sustained upon the authorities cited in its support. The case of *Buck v. Rowlinson* (*c*) is cited by Lord Stowell as the first which occurred upon the point in question, and he treats it as a direct judgment of the Court of Admiralty, and a strong indirect judgment of that great master of equity, Lord Somers, upon the invalidity of bonds containing the stipulation in question. Lord Keeper Wright had ordered the bill of the captain (who had paid the seamen) praying for relief, to be dismissed, and against the two orders made by him there was an appeal to the Lords. "The whole matter," says Lord Stowell, "travelled afterwards to the House of Peers, where the Lord Keeper's decrees upon that point were reversed, and the payment to the mariners so far affirmed" (*d*). It does not appear that the payment of the mariners was affirmed, for all that was decided by the House of Lords was, that the orders should be reversed, and that the parties should be at liberty to bring their appeal from the Court of Admiralty to a Court of Delegates. Lord Tenterden takes a different view of this case from

(*a*) P. 493, 5th edit.

(*c*) 1 Br. P. C. 102.

(*b*) 4 East, 546; 1 Dow, P. C.

(*d*) P. 513.

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Lord *Stowell*; he says, "This decision of the Court of *Admiralty* is reported to have been disapproved of by the House of Lords, who, in a case arising out of it between the master and owners, gave liberty to the parties to appeal to the Delegates against the decision. Indeed," he adds, "I am at a loss to find any principle upon which the Court of *Admiralty* could have held these bonds to have been void" (a). That learned writer then proceeds to give his own opinion with regard to the validity of these stipulations when inserted in the articles—"It has of late years been usual to stipulate by express terms in the articles of agreement signed by the seamen employed in such ships, that, in case the ship shall, by the danger of the sea, or any other accident whatsoever, be disabled or lost during the voyage, so that she do not return to and arrive at the port of *London*, the seamen shall not receive or claim any further wages than the impress money paid to them in advance, notwithstanding the ship shall at any time, before her being so disabled or lost, have broken bulk, or delivered any goods at any port or place whatsoever; and there is no instance of a claim made by the seamen against the terms of this clause in the articles" (b). The case of *Edwards v. Child* (c), was under the consideration of Lord *Tenterden* in making these observations, and he cites it as a case in which "Lord Chief Justice *Holt* is said to have decided in the same manner." In confirmation of the supposed authority of the cases of *Buck v. Rowlinson* and *Edwards v. Child*, Lord *Stowell* then refers to a decision in the *Scotch Courts*, of *Morrison v. Hamilton* (d), as establishing the position that a contract worded like the present is only a suspension of the demand, and not a limitation of the right; but he adds,

(a) Abbott on *Shipp.* 448, 5th edit. See *Ld. Stowell's observations* on this passage, 2 Dodg. 513.

(b) P. 449. (c) 2 Vern. 727. (d) 1 Bell's *Com. Law of Scotland*, 515; 2 Dodg. 514.

"Mr. *Bell* seems to think that if the agreement was more clearly expressed, it would be held effectual in *Scotland*." His Lordship then endeavours to take off the effect of Mr. *Bell's* observation, by referring to the case of *Ross v. Glasford* (*a*), where, with reference to the practice of taking such agreements, the Court declared, "that, if such a practice did exist, it was highly to be disapproved of as fraught with inhumanity and destruction to trade, and that it was high time that it should be corrected." It does not appear from this that the *Scotch* Courts would hold such agreements unlawful, but merely that the practice of entering into them was contrary to good policy, and ought to be corrected. [Lord *Lyndhurst*, C. B.—The real point appears to me to be this.—It is obvious that it was not the intention of the legislature in passing the 37 Geo. 3, that the word "until" in the articles should operate as a postponement of the right only. *Appleby v. Dods* has put a construction upon that statute, and such construction is that for which the defendant in this case contends. The articles here are adopted from those given in the schedule to the act, and it is therefore reasonable to conclude that the parties intended them to bear the same construction as that which has been put upon the form given by the statute. Does not Lord *Stonell*, in the case of the *Juliana*, take a distinction between his own situation and that of a Judge sitting in a Court of Common Law?] He says, "A Court of law works its way by short issues and confines its views to them. A Court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This Court certainly does not claim the character of a Court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognizance upon equit-

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(*a*) *Ibid.*

*Exch. of Pleas,* able principles and the rules of natural justice" (a). The  
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 disputes between the *Admiralty* and common law Courts  
 are in fact of very long standing, and led to the passing  
 of the 13 Ric. 2, c. 5, and 15 Ric. 2, c. 3. In later  
 times the jurisdiction of the *Admiralty* Courts over the  
 contracts for seamen's wages has been settled by several  
 cases. The *Mariner's case* (b), *Opy v. Child* (c), *Day v. Searle* (d), *Anon.* (e). The case of the *Juliana* is no authority on another ground. It was *coram non judice*. From the authorities just referred to, and from *Howe v. Nappier* (f), which contained a clause like the present, that the seamen should not receive their wages unless the ship returned home, it appears that the Court of *Admiralty* has no jurisdiction over contracts for wages containing special clauses, and that a prohibition would lie. [Lord *Lyndhurst*, C. B.—The parties there made no question as to the jurisdiction.] The neglect of the parties to insist upon the point of jurisdiction cannot give the Judge cognizance.

*Comyn*, in reply.—The case of *Howe v. Nappier* is no authority, for no prohibition was moved for and the jurisdiction of the Court was not disputed. The cases cited on the other side do not apply, because no freight was earned; but here the cargo reached *London*, and was accepted, and freight earned. In *Cook v. Jennings* the cargo never reached its port of delivery. [Lord *Lyndhurst*, C. B.—That case turned upon the terms of the charterparty which were not performed.] In that case *Lawrence*, J., says, "When a ship is driven on shore, it is the duty of

(a) P. 521.

from MS. in Abbott on Shipp.

(b) Mod. 879. 481, 5th edit. See also the *Sydney case*, 2 Dodg. A. R. 12.

(c) 1 Salk. 31; 12 Mod. 38,

(e) 1 Sid. 179.

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(f) 4 Burr. 1944; Abbott on

(d) 2 Str. 968; 2 Barnard. 419.

The judgment is more fully given

Shipp. 482.

the master either to repair his ship or to procure another, and having performed the voyage, he is then entitled to freight. *Appleby v. Dods* does not govern this case. It was decided upon peculiar grounds. The argument for the plaintiff is this. The voyage has been performed and freight has been earned, and the seaman is therefore entitled to his wages, or to that for which he has stipulated instead of wages; and although the cargo was not brought home in the same vessel, yet as it was the duty of the owners to forward it, and the duty of the seaman to assist in forwarding it to its destination, and as the seaman has performed that duty, he is entitled to his recompense. In point of authority upon the subject, nothing can be stronger than the case of the *Juliana*, decided by one of the most eminent Judges of modern times, after a review of all the decisions, and after a full consideration of the case of *Appleby v. Dods*. The case of the *Juliana* has been acted upon in the Courts of the *United States*, the decisions of which upon questions of mercantile law, which so frequently occur there, are well deserving of attention. [Lord Lyndhurst, C. B.—There appears to have been both before and after the judgment of Lord Stowell, in the case of the *Juliana*, a variety of decisions in conformity with it in the American Courts. They are mentioned by Mr. Justice Story, an extremely able man, in his edition (*a*) of Lord Tenterden's Treatise on Shipping.] The case of *Johnson v. Sims* (*b*) is precisely similar to the present, and it was there held that the seaman was entitled to recover.

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*Cur. adv. null.*

The judgment of the Court was now delivered by—

(*a*) Newburyport (U. S.), 1810. found at the end of the present case.  
 The whole of the note of Mr. Justice Story on this subject will be (*b*) 1 Peters's Adm. Rep. 215  
*vide post*, 345.

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Lord LYNDHURST, C. B.—This was an action brought by an administrator of *Jesse*, a mariner, to recover a sum of money claimed to be due in respect of services on board the *Royalist*, on a whaling adventure to the *South Seas*. By the articles entered into and signed by the captain and owner and crew, it was stipulated that the intestate should receive the 95th share of the clear net proceeds of the cargo, which should be procured and brought in the said ship to *London*. There was in the articles this stipulation, “That no one of the ship’s company shall be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship at *London*, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage, according to the true intent and meaning of these articles.” The vessel proceeded on the voyage in the summer of 1829, and obtained a considerable quantity of oil; but, in consequence of tempestuous weather, sustained so much damage, that on her arrival at the island of *Timor* a survey took place, and, it being found to be impossible to repair her, she was in consequence condemned. The part of the cargo that remained was shipped to *England*, partly by the way of *Manilla*, and partly by the way of *Batavia*, and the intestate accompanied that part of the cargo which proceeded to *Batavia*, and died before its arrival at *London*. The question is, under these circumstances, whether the plaintiff is entitled to recover. The plaintiff’s right to recover depends entirely on the contract, and I know no principle by which a contract entered into by a mariner is to be construed on different principles from a contract by other persons. The stipulation is clear and distinct. He is not to receive any of the net proceeds of the cargo till after the arrival, not of the cargo only, but of the vessel in the port of *London*. The vessel never did arrive in the port of *London*, and we are of opinion, that, under this contract, the

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plaintiff is not entitled to recover. This is not the first time this stipulation has been made the subject of consideration in a Court of law. In the case of *Appleby v. Dods* the same question arose. That was a voyage from *London* "for the ports of *Madeira*, any of the *West India Islands* and *Jamaica*, and to return to *London*," at monthly wages; and there was this stipulation contained in the articles, "that no seaman, &c. shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered, &c." The ship sailed from *Gravesend* with a full cargo to *Madeira* and thence to *Dominica*, and afterwards to *Kingston*, and the *West Indies*, *Port Antonio* in *Jamaica*, and then proceeded to *Martha Bray* in the same island, delivering goods and taking in a new cargo at each port successively, and freight successively earned. The vessel at last set sail from *Jamaica* to *London*, but was lost on the homeward voyage. It was clear, that, independently of any express stipulation, freight having been earned at the intermediate points to which I have referred, the mariners would be entitled to their wages *pro rata*, and the question was, therefore, whether they were entitled to their wages notwithstanding that stipulation which was contained in the articles. The stipulation was in these terms, "that no seaman, &c., shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered." *Lord Ellenborough* was of opinion, that the language of the stipulation was so express and precise that it was impossible the plaintiff could maintain the action; and thereupon nonsuited the plaintiff. The question was afterwards brought before the Court on a motion for a new trial, and the Court confirmed the decision of the Judge at *Nisi Prius*, being clearly of opinion that, unless the vessel arrived in *London*, the plaintiff could not recover. So far upon the authorities in Courts of law.

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On the other side, the case of the *Juliana*, decided by Lord *Stowell* in 1822, is relied upon. In that case the words were the same, and the decision at variance with that of *Appleby v. Dods*; but the learned Judge, in the course of the judgment which he gave, drew a distinction between the principles by which Courts of common law are regulated, and those rules and principles which regulate the decisions in Courts of Admiralty. He says, "A Court of law works its way by short issues, and confines its views to them. A Court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This Court certainly does not claim the character of a Court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognizance upon equitable principles, and the rules of natural justice." It is further to be observed, that, in that case, the learned Judge appears to have misapprehended the case decided by Lord *Holt* in Lord *Raymond*. He supposes that learned Judge to have pronounced these bonds to be illegal and invalid; whereas the true effect of Lord *Holt's* decision is given by Mr. Justice *Lawrence* in *Appleby v. Dods*, and amounts to no more than this, that the sailors were entitled to recover according to the terms of their contracts, whatever counter claims there might be against them, upon the bonds into which they had entered. Therefore, it was not necessary, nor was Lord *Holt* called on to pronounce, nor could he have pronounced, any opinion as to the legality or illegality of the bonds. The learned Judge also seems to have misapprehended the judgment in *Appleby v. Dods*. He seems to consider it to be founded on its being a *West India* voyage; but it is clear that Lord *Ellenborough* did not enter into any such consideration. He says, "The terms of the contract are general, and include the present case; and we cannot say, against the express contract of

the parties, that the seamen shall recover *pro rata*, although the ship never did reach her port of discharge named." The decision therefore was founded, not on the nature of the voyage, but on the express contract of the parties. As to *Buck v. Rawlinson*, and *Edwards v. Child*, they were cases in equity. It is extremely difficult to be certain of the precise grounds on which the Courts proceeded, but enough appears on the reports to justify us in coming to the conclusion that those decisions were founded solely on equitable principles—principles which have no application to decisions in Courts of law. We are of opinion, therefore, that this being a question agitated and to be decided in a Court of law, it must be decided according to those rules which the Courts of common law have adopted as applicable to the construction of contracts. The language of this contract is clear and distinct, and the plaintiff cannot recover. As to the services performed subsequent to the vessel being sold, not under the contract, in bringing home part of the proceeds, to that extent the plaintiff will be entitled to recover on the last count of the declaration—the amount to be ascertained by agreement out of Court.

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#### Judgment for the defendant on the special counts.

The following abstract of the *American* decisions on this question is from Mr. Justice Story's edition of *Abbott on Shipping* :—

Judge Winchester (cited in 1 Peters's Adm. Rep. 186) says, "It has been usual to insert a clause in sailors' articles, 'That no wages shall be due or claimed until the return of the ship to her home, and the cargo or ballast delivered;' and it is contended by the ship-owners, that, upon the true con-

struction of this clause, seamen lose all claim to wages in the event of a loss on the homeward bound voyage. On behalf of the seamen it is contended, that this clause only applies to wages dependent on the homeward voyage, and does not relate to wages antecedently earned. On the first view

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of this clause, the construction which presents itself as most consistent with the law of the *United States*, and the justice of the case, is, that the parties could only intend it to apply to the *time* and *place* in which the wages shall be legally demandable. But, when the clause is so framed as to preclude all construction, and the intent of the parties is plainly expressed, the only question for consideration is the legality of such a stipulation.

"In an agreement by seamen, that their wages shall depend upon the earning of the freight, conformably to the engagements with the freighter, there is nothing inconsistent with the provisions for their regulation and government. It is competent for them to connect their right of wages with the owners' right to freight upon a voyage comprising more than one port. The admission of the validity of this sort of agreement is predicated upon the fairness of the transaction, and a full and fair disclosure by the owners to the seamen. But the legality even of this agreement, derogating from the general maritime law, was denied in the case of *Edwards v. Child*, 2 Vern. 727, in which it is said Lord *Holt* made a similar decision. It is true, that the authority of this case has since been questioned, and may be considered as overruled, so far as it restrains agreements by which wages are made to depend on the earning of freight, agreeably to the contract of affreightment, but no farther; for the very ground on which its authority is denied is the fact,

which appeared in the cause, that the seamen had received their share of the imprest money, which was all that had been received by the shipowners or captain.

"The freight earned in a voyage constitutes a common stock, and in the hands of the owners is a trust-fund to be accounted for to those whose industry produced it. A clause by which it should be stipulated, that he who bears the labour and hazard of acquiring the common stock, shall bear all the loss and not participate even in the wreck of profit, is not consistent with any just notion of co-partnership or common interest. It is wholly incompatible with every idea of a trust, to permit one to eat up the whole estate; and as an agreement to grant or cede it, is wholly destitute of all actual, as well as moral or equitable consideration, it is a *nudum pactum*. It is in its very nature fraudulent as to one of the parties; and, with a view to public policy, equally reprehensible, from its tendency to separate the interest from the duty of sailors, and induce them to repair by embezzlement the loss which such an agreement subjects them to. I am therefore of opinion, that the only legal effect of such a stipulation is to preclude the seaman from libelling in foreign ports, until the vessel return or the voyage be ended; that it is invalid to produce a forfeiture of wages, and that, upon solid principles of law and policy, freight must always be considered the mother of wages; and, notwithstanding any agreement to the

contrary, where the former is earned, the latter must be paid.

"From the elaborate opinion of the learned Judge, the foregoing extracts are the more copiously made, because it presents a striking view of one side of the question. In *Johnson v. Sims*, 1 Peters, Adm. Rep. 215, on the construction of the following clause of a shipping paper, "no officer or seaman belonging to the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge in Philadelphia," Judge Peters decided, that the clause amounted only to a stipulation, not to be entitled to demand or receive payment of the wages but in Philadelphia. It did not alter the substance of the contract or the operation of law, but merely as regarded the time and place of payment. It was not a contract that the risk should be insured on the arrival guaranteed by the mariner.

"The same principle was decided in an action brought by a mate to recover his wages upon the following case:—The shipping paper contained this clause, "No officer or seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of said vessel at Beverley, or her port of discharge, and her cargo delivered." The vessel arrived at Corunna, discharged her cargo, and thence sailed in ballast to Bordeaux, where she took in a cargo for Guadalupe, and was captured on her passage to that

island and condemned. It was contended, first, that no wages were due on account of the above clause, the vessel never having arrived at her port of discharge; and, 2ndly, that, if any wages were due, they were due only to the arrival in Corunna, and half the time the vessel lay there, that being the last port of discharge. But the Court (*Dana, C.J., Paine, Bradbury, Dawes, and S. Sewell, Js.*) were of opinion that the clause in the shipping paper related only to the time and manner of payment of the wages, agreeably to the Act of Congress for the regulation of seamen in the merchants' service, (1 U. S. L. 134—140, sect. 6), which entitles the mariner to claim one-third of his wages at every port of discharge, unless the contrary be expressly stipulated, and was not a condition precedent to the recovery of wages; and, further, that *Bordeaux*, and not *Corunna*, must be considered the last port of discharge; that the going there was without doubt a measure beneficial to the voyage, and adopted without the consent of the mariners, and over which they had no control. The Court accordingly adjudged wages to the plaintiff up to the arrival of the vessel at *Bordeaux*, and half the time she was there; and *Dana, C.J.*, said, that, if by the crafty subtlety of a merchant the word had been *unless* instead of *until*, he should hold it void as against the seamen, whom the Court was bound to protect against their own thought.

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lessness and incon sideration. *Middle v. Stephens, Essex, Nov. Term,*  
S. I. C., A.D. 1800, MS.

"But in a subsequent case, on an action brought by a mariner to recover wages, the shipping paper contained the following written clause, which, before signing, was explained to the mariners:—"And we do further agree and consent to ship for the above-mentioned voyage" (which was from *Salem* to *Hamburgh*, and any other ports the master deemed it best to proceed to, and back to *Salem*), "and that if any capture is made of said brig or cargo, by any vessel of war, or any persons whatsoever, and the vessel and cargo condemned or is restrained from the owners, then we agree that our wages that may be due to us shall not be paid to us, or any part thereof, by the owners of said brig and cargo, until they recover back said brig and cargo, or receive compensation for the

same; and if not recovered back, nor no compensation therefore, then we agree to bear the loss of all our wages, and to be satisfied and contented with nothing more from the owner than our master's advance wages, which we have received." The brig sailed to *Hamburgh*, and there discharged her cargo, and after taking in another cargo proceeded to *Surinam*, and there delivered her cargo, and took on board another cargo, and on her passage to *Salem*, was captured and condemned, and no compensation ever received by the owner. The cargo was insured to its full value, and the brig to two-thirds of her value, which insurance had been paid, but the freight was not insured. The Court were of opinion that the plaintiff was not entitled to recover. *Goodridge v. Peabody, &c., Essex, April Term, S. I. C., A.D. 1803, MS.*"

Exch. Chamber,  
1834.

## IN THE EXCHEQUER CHAMBER.

ABRAHAM HENRY CHAMBERS, the Elder, *v.* BERNASCONI  
and Others.

(*In Error from the Court of Exchequer.*)

**E**ROR on a bill of exceptions.—This was an action of *assumpsit* for money had and received, brought by the plaintiff against his assignees to try the validity of a commission of bankrupt issued against him. The defendants pleaded the general issue. The cause was first tried before Lord *Lyndhurst*, C. B., at the *Middlesex* Sittings, after *Hilary Term*, 1831, when the plaintiff obtained a verdict. The Court of *Exchequer* having afterwards granted a new trial (*a*), the case was again tried before Lord *Lyndhurst*, C. B., at the *Middlesex* Sittings, after last *Hilary Term*, when it was proved that the defendants were assignees of the estate and effects of the plaintiff and *A. H. Chambers*, the younger, under a commission of bankrupt issued against them on the 19th of November, 1825. The material question at the trial was, whether the plaintiff had committed an act of bankruptcy, and that principally depended upon the place where the

Depositions of deceased witnesses taken before commissioners of bankrupt on the opening of a commission, and subsequently enrolled by the assignees afterwards appointed pursuant to the 6 Geo. 4, c. 16, s. 96, are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees for the purpose of disputing the validity of the commission.

By the course of the office of

the sheriff of *M.* the officer making an arrest was required to make a return in writing, signed by him, of the arrest, and of the place where the arrest took place. A writ having been delivered to *W.*, a sheriff's officer, to arrest *A. B.*, *W.* arrested him accordingly, and made the following return:—“9th November, 1825, arrested *A. B.* in *South Molton Street*, at the suit of *W. B.*,” which return was signed by the officer and sent by him to the sheriff's office on the execution of the writ, and was then filed with the writ according to the course of the office. The writ and certificate were produced by the under-sheriff at the trial:—*Held*, that in an action brought by *A. B.* against a third party, the certificate was not admissible after the death of the officer to prove the place where the arrest was made.

(*a*) *Vide 1 Cr. & J. 451.*

*Eccles. Chamber,* plaintiff was arrested on the 9th of November, 1825; whether at the plaintiff's residence at *Paddington*, or in *South Molton-street*; the alleged act of bankruptcy being the keeping house by the plaintiff and denying himself to his creditors at his residence at *Paddington*. The bill of exceptions stated, that, to prove that the arrest had taken place at *Paddington*, one *Thomas Brett* was called as a witness for the defendants, and that he stated that in the year 1825 he was assistant to *Thomas Wright*, who was then one of the officers of the sheriffs of *Middlesex*, but who had since died; that he and *Wright* arrested the plaintiff by virtue of a warrant from the sheriff of *Middlesex* on the 9th of November, 1825, and that to the best of his belief such arrest took place at the plaintiff's cottage at *Paddington*. The exceptions then stated that the plaintiff's counsel, for the purpose of shewing that the arrest of the plaintiff was made at an office in *South Molton-street*, tendered in evidence certain depositions of one *Fletcher*, a late clerk of the plaintiff's, but who was proved to have since died, and also of *Wright*, the sheriff's officer, taken before the commissioners of bankrupt at *Basinghall-street*, on the opening of the commission on the 19th of November, 1825, which depositions stated the arrest of the plaintiff to have taken place on the 9th of November, 1825, at an office in *South Molton-street*, and which depositions had been duly entered of record by the defendants as assignees, under and by virtue of the 6 Geo. 4, c. 16, s. 96. That the defendants' counsel objected to the admissibility of the depositions, and that the learned Lord Chief Baron refused to receive the evidence. The exceptions further stated that Mr. *Burchell*, the under-sheriff of *Middlesex*, was called, and that he proved that it was part of the course of the office of the sheriff of *Middlesex* to require a return in writing of the arrest, and of the place where the arrest is made, under the hand of the

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sheriff's officer making the arrest; that the certificate of arrest after mentioned was annexed to a writ issued the 8th of November, 1825; at the suit of one *William Brereton*, against the said plaintiff and *A. H. Chambers*, the younger, and that *Wright* was the officer who had the execution of that writ; and that he, the under-sheriff, could not return a defendant not arrested when he had got a certificate of arrest from the officer, and that these certificates were the papers on which the sheriff acted in making the return. Mr. *Burchell* then produced the writ and the certificate of *Wright* annexed thereto, which he stated was returned by *Wright* after the execution of the writ, and was written and signed by him. The certificate was as follows:—

“ 9th Nov. 1825.—Arrested *Abraham Henry Chambers*, the elder, only, in *South Molton-street*, at the suit of *William Brereton*.

“ *Thomas Wright.*”

The Lord Chief Baron having refused to receive the certificate as well as the depositions in evidence, the defendants obtained a verdict. A bill of exceptions was tendered to the learned Lord Chief Baron on his rejecting this evidence, and was accordingly sealed by him, and the exceptions came before this Court for argument in the vacation after last *Easter Term*.

The *Attorney-General* for the plaintiff.—The first question is, whether the depositions offered in evidence by the plaintiff ought not to have been admitted. The act of bankruptcy set up by the defendants was supposed to have been committed at *Paddington* on the 9th of November, when and where the defendant was alleged to have been arrested. The depositions in question were offered in

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*Exch. Chamber,* evidence for the purpose of shewing that the arrest in  
1834. fact took place in *South Molton-street*, and if so, no act  
CHAMBERS of bankruptcy was committed, as the alleged act of bank-  
v. ruptcy was the keeping house at the plaintiff's residence at  
BERNASCONE. *Paddington* on that day. There had been a former arrest  
of the plaintiff at his house at *Paddington* after his having  
been denied to the officers, which, it is admitted, was a  
good act of bankruptcy; but that being on the 7th of *June*,  
1825, and consequently before the 1st of *September* in that  
year, when the 6 *Geo. 4.* came into operation, would not  
support a commission issued after that time, according to  
the case of *Maggs v. Hunt* (*a*). It therefore became ne-  
cessary to prove an act of bankruptcy after that period.  
It is found that the depositions were duly taken before the  
commissioners on the opening of the commission. The  
witnesses were therefore judicially examined: they were  
also proved to have since died, and consequently could not  
be called. It is contended, therefore, that these depo-  
sitions were evidence against the assignees acting under the  
commission. By the 5 *Geo. 2.*, c. 30, s. 41, it is provided,  
that, upon petition to the Lord Chancellor, the depositions  
taken before the commissioners of bankrupts may be entered  
of record; and in case of the death of the witnesses prov-  
ing the bankruptcy, or in case the commission, depositions,  
proceedings, or other matters or things shall be lost or  
mislaid, a true copy of the record of such depositions and  
proceedings, or other matters or things, shall and may  
upon all occasions be given in evidence to prove such com-  
missions, and the bankruptcy of the persons against whom  
such commissions shall have been awarded, or other mat-  
ters or things; and it has been decided, that the depositions  
of the act of bankruptcy when recorded according to that  
act, are evidence in an action at law to prove the precise

(a) 4 Bing. 212.

time when the act of bankruptcy was committed, if specified therein. *Janson v. Willson* (*a*). The recent statute of the 6 Geo. 4, c. 16, makes the depositions evidence for the assignees in certain cases (*b*). The 95th section empowers the Lord Chancellor to appoint an officer to inroll the proceedings in bankruptcy; and section 96 provides, that the proceedings may be inrolled on petition to the Lord Chancellor; but that act omits to make the depositions of deceased witnesses evidence, as they had been by the 41st section of the 5 Geo. 2, c. 30, and when the assignees offered these depositions in evidence on the trial of the case of *Bernasconi and Others v. Farebrother, Lord Tenterden* rejected them, and the act of the 2 & 3 Will. 4, c. 114, s. 7, was passed to supply the omission. It does not appear that there has ever been any act of Parliament which has made these depositions evidence against the assignees; but that, it is contended, was unnecessary, as by the rules of the common law they must always have been evidence against them. They are the title deeds as it were under which the assignees claim. It is found that the depositions were duly taken for the purpose of proving this act of bankruptcy, and for the purpose of making out the commission. The depositions were taken in the course of a judicial proceeding had by the petitioning creditors, with whom the assignees when appointed must be taken to be privies. The rule is, that where depositions are taken in a judicial proceeding, to which the person against whom they are offered in evidence, or the person under whom he claims, is a party, such depositions are admissible in evidence against him, because an opportunity is afforded of cross-examining the witnesses. [*Tawnton, J.*—What opportunity had the assignees to cross-examine the witnesses at a meeting which is

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(*a*) 1 Douglas, 257.

(*b*) *Vide*, s. 92.

*Exch. Chamber,* strictly private, as all meetings for opening a commission and  
1834. declaring a party a bankrupt always are.] The witnesses are brought forward by the creditors to support the commission, under which the defendants are acting as assignees.  
*[Taunton, J.—*The witnesses are supposed to be produced by the petitioning creditor, who is often in an interest adverse to that of the assignees afterwards appointed.] If the assignees when appointed agree to take the office, and to rely on the act of bankruptcy adduced in support of the commission, they attorn as it were to the commission, and they are in the same situation as the petitioning creditor. But, further, these defendants have actually inrolled these depositions of record. It is found that they are not only duly taken but duly inrolled. That is an adoption of them by the assignees, by which they give them authenticity. Supposing these defendants had said the depositions are true and may be relied on, that would have made them admissible. Then the inrolment is a stronger act of recognition. It is said by Mr. Starkie in his learned Treatise on Evidence (*a*), “that depositions of witnesses, though made under the sanction of an oath, are not in general evidence as to the facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called on, and had the opportunity to do so;” he then proceeds to give the different tests, one of which is, that the party against whom the depositions are proposed to be used was a party to the proceeding in which they were taken. He further says in page 268, “Depositions in a former cause cannot, in general, be read against one who does not claim under the party with whom such depositions were taken; but in equity, if a legatee bring a bill against the executor and prove assets, it is said that another legatee, though no

(*a*) 1 Stark. on Ev. 264, 2nd Ed.

party, may have the benefit of those depositions; at law they may be read where the defendant claims in privity with the defendant in the former suit." Here, it is contended that the assignees claim in privity with those who brought forward the witnesses in support of the commission, and if that be so, the depositions ought to have been received; and besides, in this case, the assignees have themselves inrolled the depositions, and so given them authenticity.

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Secondly, the written certificate of the officer, made by him at the time of the arrest, in the course of his office, and according to his duty, and returned by him to the sheriff's office, from whence it was produced by the under-sheriff at the trial, was admissible in evidence after the death of the officer. This certificate was sought to be given in evidence for two purposes, *first*, to prove the *fact* of arrest; and, *secondly*, the *place* where the arrest took place. In the first place it was evidence of the fact of arrest on three grounds: *first*, it was a written declaration, signed by the party making it, and against his interest; *secondly*, it was an entry made in the course of office, and according to the duty of the party making it; and, *thirdly*, it was an entry made at the time, by a person peculiarly cognizant of the fact, and having no interest to misrepresent the truth. According to the cases it would have been clearly admissible if it had been an acknowledgment of the receipt of money or of goods; and this is admissible for a similar reason; for it is an acknowledgment of having the plaintiff's body in his custody: the sheriff could not afterwards say that he had him not, or return *non est inventus*. There is no difference in principle between acknowledging the receipt of money and this acknowledgment. They are both equally against the interest of the party making it. But, even taking it that the officer had no interest either way, this is an entry made by a person cognizant of the fact,

*Exch. Chamber,* having no motive to misrepresent, and who makes the entry in the course of his office and in the discharge of his duty, and it is therefore evidence after his death. This rule has been established by a variety of decisions, but particularly by the recent decision in the case of *Doe d. Patteshall v. Turfard* (a). It was in that case proved that it was the usual course of practice in Mr. *Patteshall's* office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; and, on one occasion, that Mr. *Patteshall* himself prepared a notice to quit to serve on a tenant, and took it out with him together with twenty other notices prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant. Two of the notices were proved to have been delivered by him on that occasion. On the trial of an ejectment after Mr. *Patteshall's* death, *Littledale*, J., admitted the indorsement to be read in evidence to prove the service of the third notice, and the Court of *King's Bench* afterwards affirmed the ruling of the learned Judge, and held that the indorsement was admissible in evidence to prove the service of the third notice. Assuming, then, that the certificate was admissible to prove the *fact* of arrest, the next question is, was it admissible to prove the *place* where the arrest took place. The rule is, that where there is an entry made by a deceased person, which, on the ground of its being an entry against the interest of the party making it, may be read in evidence, such entry is evidence of all the collateral circumstances mentioned in it, naturally connected with the subject matter of the entry. To narrow it to so much only of what is contained in the entry, as is against the interest of the party making the entry, would be to fritter

away the rule altogether. Thus, in the case of stewards' books, the receipt of the money, which is the direct fact which makes the entry evidence, is not in general in dispute; but they are offered for the collateral circumstances which they tend to prove, as the payment of a quit rent, to shew the estate the party paying had in the land. [Taunton, J.—There was a case which was tried at Monmouth, *Doe d. Powell v. Hill*, which is in confirmation of that observation. The books of a steward were produced to prove the payment of rents by tenants within a certain district. I contended that they could only be received to prove the fact of payment and receipt of rent; but Chief Baron Richards held that he could not divide the evidence or split the entry into two, and that if it was evidence for one purpose it was evidence for the other.] Entries are scarcely ever produced with reference to the principal object for which they have originally been made. In *Higham v. Ridgway* (a), the entry in the surgeon's books was received to shew the time of the birth, and not to prove the payment for the attendance on the mother. For the same reason, would not the entry have been receivable to prove the *place* of the birth, had that been mentioned in it and become material, which it might have been; as for the purpose of shewing the eligibility to a fellowship, or to the freedom of a corporation, or the like? It is submitted that it clearly would. This certificate was admissible to prove the place of arrest, on the ground also of its being an entry made by the officer in the course of his employment, and according to his duty. It was proved to be part of the duty of the bailiff making an arrest to return to the sheriff's office a certificate of the arrest having been made, and of the place where it was made. It may be most material to know the particular place within the bailiwick where the arrest took place, as when it is made within a liberty. It is the duty of the bailiff

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(a) 10 East, 109.

*Esch. Chamber,* to obey the orders of the sheriff, and the orders of the sheriff  
1834.  
*CHAMBERS v.*  
*BERNASCONI.* iff are, that he is to return the arrest and the place where it was made. Here *Wright*, the officer, has made his return pursuant to those orders. Then, is not this a return made by him in the discharge of his duty? If this is admissible to prove the *time* of arrest, it is difficult to see how it was not admissible also to prove the *place* of arrest. That it is admissible to prove the former, *Doe v. Robson* is in principle an authority in point. [ *Tindal*, C.J.—Why is the *place* material? The sheriff is not bound to return the place: he is only bound to return that he has the body ready.] It is clearly evidence as to the time of the arrest, and if so, it is submitted that it is evidence as to the place also; it is part of the same entry, and cannot be split into two parts. Besides, this is an entry made by a party cognizant of the fact in the course of his employment and according to his duty, having no motive to misrepresent the truth, and made either against his interest, or without interest on the subject. In *Price v. Lord Torrington* (a), which was an action for beer sold and delivered, the evidence to prove the delivery was, that the usual course of the plaintiff's dealing was for the draymen to give an account to the plaintiff's clerk of the beer they had delivered out, which he set down in a book kept for that purpose, which the draymen signed; and it was held on proof that the drayman was dead, and that the signature to the book was his signature—that the entry was admissible to prove the delivery of the beer. So, in *Hagedorn v. Reid* (b), which was cited and recognised by *Parke*, J., in *Doe v. Turfard*, it was held that a memorandum of the deceased clerk of a merchant in a letter-book, stating that a licence had been sent off by post, was admissible in evidence to shew that the licence had been sent, on proof that it was the usual course of business in the merchant's counting-house that the clerk

(a) 1 Salk. 285.

(b) 3 Campb. 379.

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who copies any licence in the letter-book sends it off by post, and makes a memorandum on the copy of his having done so. So, in *Champneys v. Peck* (*a*), which is a still stronger case, it was held that an attorney's bill, indorsed "March 4, 1815, delivered a copy to C. D.", which indorsement was proved to be in the handwriting of a deceased clerk of the plaintiff whose duty it was to deliver a copy of the bill, and proved to have existed at the time of the date, was evidence to prove the delivery of the bill. In *Pritt v. Fairclough* (*b*), an entry by a deceased clerk of the plaintiff in a letter-book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was held good secondary evidence of the contents of the letter, on proof that, according to the plaintiff's course of business, the letters which he wrote were copied by this clerk, and then sent off by post; and that, in other instances, the copies so made by this clerk had been compared with the originals, and always found correct. In *Warren d. Webb v. Greenville* (*c*), on which the case of *Doe v. Robson* afterwards proceeded, entries of the charges made in an attorney's book were admitted to shew the surrender of a life estate, in order to support a subsequent recovery. *Doe v. Robson* (*d*), is a very strong case in favour of the plaintiff. There the question was, when a particular lease, purporting on the face of it to take effect in reversion, *viz.* from a future day, was actually granted; as the power under which the lessor assumed to demise, was to grant a lease to take effect in possession only; and entries of charges in an attorney's book, which were shewn to have been paid, were admitted to shew that it was not really executed till after its date, and after the day named in the lease from which it was to take effect. *Lord Ellenborough* there says, "the ground upon which this evidence has been received is, that there is a total ab-

(*a*) 1 Stark. N. P. C. 404.

(*c*) Stra. 1129.

(*b*) 3 Camp. 305.

(*d*) 15 East, 32.

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sence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." Mr. Starkie, in his excellent Treatise on Evidence (*a*), says, "it may however be observed, that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems, both in reason and upon the authorities, to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party, and in many instances the doctrine of admissibility on that ground has been pushed to an extraordinary, if not untenable, extent;" and he adds, that Lord *Ellenborough*, in *Doe v. Robson*, "lays no stress on the fact that it appeared that the charges had been paid;" but on the ground of there being a total absence of interest to pervert the fact, and a competency to know it. In *Doe v. Turford*, before cited, Lord *Tenterden* puts the admissibility on the ground of its being an entry made by a person in the discharge of his duty. He says, "the indorsement having been made in the discharge of his duty, was, according to the authorities cited, admissible evidence of the fact of the service of the original." [Tindal, C. J.—Has not the clerk an interest in saying that he has done his duty? It may blind the eyes of his employers.] The entry cannot be used whilst he lives. Unless he dies it cannot be of the least avail. The leaning of the Courts at present is to make evidence admissible to the jury, and to let them judge of the degree of credit to which it is entitled.

Sir James Scarlett, *contrà*.—It has been contended, in the first place, that certain depositions taken before the commissioners of bankrupt on the opening of the commission are evidence; *first*, on the ground of its being

(*a*) Vol. I, p. 298.

a judicial proceeding, and of there having been an opportunity afforded of cross-examining the witnesses; and, *secondly*, on the ground of there being some supposed privity between the assignees and the petitioning creditor who brought forward those witnesses. The first position was answered by Mr. Justice *Taunton*, who observed that a party is always declared a bankrupt at a private meeting, at which the commissioners and the solicitor to the commission are alone present, and where therefore the defendants, the assignees afterwards appointed, could have had no opportunity of cross-examining the witnesses. But it is then said that they are evidence, on the ground of there being a privity existing between the assignees and the petitioning creditors who issued the commission, and who produced the witnesses to prove the act of bankruptcy on the opening of the commission. But no such privity exists. The assignees, who are afterwards elected, are often in adverse interests to the parties who sue out the commission; and is it to be said that the assignees, who are not only not friendly, but in direct hostility to the party and the attorney who issued the commission, shall be bound as privies? For the purpose of supporting the commission, the act of bankruptcy is most commonly proved by other witnesses than those who are brought forward at the opening of the commission. If the assignees could only have established their title as assignees by this evidence alone, there might be some ground for saying that the depositions were evidence against them; but as the assignees were at liberty to prove the act of bankruptcy by other means, and the depositions are produced to impugn the commission which they were taken to support, surely the assignees are at liberty to repudiate all privity with those who adduced the witnesses. The common notion of a privity is, where a person is a party to the same contract or claims an interest in the same estate; but here no estate or interest is claimed under any assignment founded on this particular act of bank-

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*Each Chamber, ruptcy.* If it could have been contended that these de-  
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positions were the only evidence to prove the act of  
CHAMBERS bankruptcy, they might have been admissible against the  
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BERNARDONI. assignees.

It is also contended that these depositions are evi-  
dence, because they have been inrolled by the assi-  
gnees. But although the assignees under the provisions  
of the 96th section of the 6 Geo. 4 have caused these  
depositions to be inrolled, is there any authority for  
saying that all which the assignees inrol in compliance  
with their duty is evidence against them? [Patteson, J.—  
The 96th section, which enacts that no commission of  
bankrupt or adjudication of the commissioners shall be  
received in evidence, unless they shall have been entered  
of record, and that the Lord Chancellor may, on petition  
or application of any party interested, direct that the  
depositions or other matters relating to the commission  
of bankruptcy shall be entered of record, does not make  
it imperative on the assignees or any other party to cause  
them to be inrolled, but only says that they shall not be  
received in evidence unless inrolled. Tindal, C. J.—  
They inrol them for the purpose of supporting the com-  
mission.] The circumstance of the assignees having in-  
rolled these depositions cannot make them evidence  
against them. It would be very hard if their having  
done so in pursuance of the act, in order to have  
that evidence ready to support the commission, should  
make the depositions evidence against them. This  
action, however, was pending before the passing of the  
2 & 3 Will. 4, c. 114, s. 7, and therefore these deposi-  
tions could not be read for the assignees in support of the  
commission. By that act, the provision in the 5 Geo. 2,  
c. 30, s. 41, is in substance re-enacted; and in the event of  
the death of any of the witnesses deposing to an act of  
bankruptcy, &c., it is made lawful for the assignees, and  
all persons claiming through or under them, to read in  
evidence, in support of the commission, the depositions

of deceased witnesses which shall have been inrolled pursuant to the provisions of former acts; but there is a proviso that they shall be evidence "in such cases only where the party using them shall claim, or defend, some right, title, interest, claim, or demand, which the bankrupt might have claimed, maintained, or defended in case no commission of bankrupt had issued, and shall not be read in evidence in any action now pending, by which the validity of any commission may be brought into question." These depositions, therefore, could not have been read for the assignees, even if the action had been brought after the passing of the 2 & 3 Will. 4.

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1834.*

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The second question is, whether the certificate of the officer is admissible in evidence. It is contended that the certificate of a public functionary, written by him in the course of his office, on a subject peculiarly within his knowledge, and in which he has no interest to misrepresent the truth, is admissible in evidence after his decease. But every case in which it has been decided that evidence not upon oath is admissible must be taken as an exception to the general rule. It is too often thought that the exception has established a new principle. According to this new principle which has been contended for, the contents of every merchant's books would be evidence for him, after the decease of the clerk who made the entries. According to this principle, why would not the letters and statements collected by a man in writing a history of his own times be admissible in evidence to prove the facts there detailed? But cases of the admission of evidence not upon oath are exceptions to the general rule, and have turned on the necessities of mankind, which have been supposed in the particular case to justify the departure from the general rule. In the report of the present case in the Court below, Mr. Baron Bayley says (*a*), "There is one instance where

(*a*) 1 C. & J. 457.

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a subscribing witness on his death-bed acknowledged the falsehood of his attestation; but that is the only instance, and is the exception to the general rule." And that learned Judge appears to doubt whether this certificate was receivable in evidence at all; but if receivable to prove the fact of the arrest, he appears to have entertained a very strong opinion that it was not admissible to prove the place where the arrest took place. Suppose the sheriff had returned *non est inventus*, and there had been an action against him for a false return, would this certificate have been evidence against the sheriff to shew that he had arrested the defendant? There is no doubt that it would not. If the certificate is evidence to shew the time and place of arrest, it would be evidence also of any circumstances stated in it, as that the defendant admitted that the debt was due. But the principle upon which the cases have gone is contrary to the principle advanced on the other side. In the case where a deceased steward has charged himself with the receipt of rents, such entry is admissible to prove on what account it was received, because it is part of the *res gestæ*. Thus, if a steward enters the receipt of rent from A. "tenant of a certain manor," it is admissible to shew that the rent was paid by A. as tenant of the manor, because it is part of the *res gestæ* that A. paid it on that account; but, if the steward had added any particular fact which had occurred on the occasion of the payment, as that there had been a festivity at the castle on that day, it would not have been evidence of the fact so stated. The case of *Higham v. Ridgway* goes to the extreme point. There the question was as to the time of the birth of a child; but, when a midwife delivers a lady, it is so necessary that the delivery should take place before the money is paid, that it is evidence that the child must have been born before or on that day. Lord *Mansfield*, in *Goodtitle v. The Duke of Chandos*, explains the case of *Warren v. Greenville*, in which he states he was counsel—

"The entry in the attorney's bill book was made at the time of the transaction, and a receipt had been given upon the bill which contained the articles for drawing and engrossing the surrender: so that there was positive proof in that case of an actual surrender;" that is, the direct inference was that the surrender must have been made before the bill was paid. The case of *Hagedorn v. Reid* is a doubtful decision; and as the plaintiff was nonsuited afterwards on another ground, it was unnecessary to bring that decision before the Court in *banc*. As to the principle deduced from *Champneys v. Peck*, that is a rule of evidence taken from an undefended cause at *Nisi Prius*, and Lord *Ellenborough* being of opinion that it was not sufficient to prove that the indorsement on the bill was in the handwriting of a deceased clerk, without shewing that the indorsement existed cotemporaneously with the date, it does not appear what the nature of the evidence finally adduced was, and therefore, it cannot be known on what ground Lord *Ellenborough* formed his opinion that there was evidence to go to the jury of the due delivery of the bill. The judgment of Lord *Tenterden* in *Doe v. Turfard* must be taken with reference to the facts of the case; and *Parke*, J., observes on "the actual delivery of other notices to other tenants taken out at the same time, and the defendant's request that he might not be compelled to quit," which almost amounts to an admission that he had received the notice to quit. And *Taunton*, J., puts it on the corroborating circumstances, which rendered it probable that the fact occurred. If what is contended for on the other side is law, any thing that an attorney's clerk writes in the office in the course of his employment will be evidence after his death. The case of *Doe v. Robson* stands on the same ground as *Warren v. Greenville*, that items in an attorney's bill containing charges for business done, which had been paid for, were admissible in evidence after the death of the party making the entries, to shew that the business had been done which

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*Exch. Chamber.*, was part of the *res gestæ*. It may be said that Lord *Ellenborough* did not put it on the fact of payment; but can it be said that Lord *Ellenborough* decided that case without reference to the cases cited? In the case of *Salte v. Thomas* (a), it was held that the prison books of the *Fleet* and *King's Bench* prisons, though admissible in evidence to prove the period of the commitment and discharge of a prisoner, were not admissible to prove the cause of his commitment. It is submitted, *first*, that the certificate of the officer is not admissible to prove the fact of arrest; and *secondly*, that at all events it is not admissible to prove the place where the arrest took place.

The *Attorney-General* in reply.—*1st*, The depositions taken on an examination of witnesses in a judicial proceeding, the witnesses being dead, are evidence against the parties producing the witnesses, and those who are privy to them. It is said that there is no privity between the assignees and the petitioning creditor; but the assignees take under the adjudication of the commissioners, and, by accepting their appointment, they adopt and become privy to the adjudication, and to the previous depositions on which it was founded. But, even if they were not bound by them, by accepting their appointment as assignees, they have since deliberately adopted the proceedings by inrolling them. They might have inrolled any of the depositions or none; but, having done so, they have authenticated them by that inrolment. *Secondly*, as to the certificates, it is submitted that an entry made by an agent in the course of his employment and in the discharge of his duty, and which he records contemporaneously, is admissible to prove the fact there stated. In *Doe v. Turfard*, Mr. Justice *Parke* says (b)—“It is to be observed, that, in the case of an entry being admissible as against interest, proof of the hand-writing of the party and his death is

enough to authorize its reception : at whatever time it was made it is admissible; but in the other case it is essential to prove that it was made at the time it purports to bear date: it must be a cotemporaneous entry." But it is argued, that, even if the certificate be admissible to prove the arrest, it is not so to prove the place where it took place; and it is said that the rule is, that, to make the statement evidence, it must be part of the *res gestæ*. It is admitted that an entry of any idle story, not connected with the purpose of the employment, would not have been evidence; but it may be essential to the sheriff, to shew the place where the party was arrested. The rule may be laid down with this distinction, that where an agent makes an entry in discharge of his duty it shall be evidence, but not where the entry is not made in the discharge of his duty. It is submitted, that this certificate, being made by the agent of the sheriff at the time, within the scope of his authority and in discharge of his duty, is admissible. No one instance has been pointed out where the entry has been produced to prove the mere fact of payment, but the facts sought to be established in evidence have always been the collateral circumstances which attended the entry. In *Higham v. Ridgway*, no date is given to the entry of the word "paid," but only to the act for which the payment is made. That has been considered as a leading authority on the subject. Had the place of the birth been stated in the entry in that case, there is no reason whatever why it should not have been admitted to prove that fact. In *Warren v. Greenville* and *Doe v. Robson*, there was no date to the payment, and in the latter case the payment appears to have been proved *déhors* the entry itself. The fact of payment is no ingredient in these decisions; and Lord *Ellenborough*, in *Doe v. Robson*, repudiates the notion of payment being any ingredient in the decision (a). [Bosanquet, J.—But

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(a) See also 1 Stark. on Evidence, 299.

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the fact of payment existed.] The fact of payment cannot affect it. There is no interest as to the fact of payment, as the party charges and discharges himself by the same entry. The admissibility of these entries rests on the ground of their being written contemporaneous entries made by a party in the course of his employment and the discharge of a duty. The case, therefore, which has been put on the other side, of a person writing a history of his own times, does not fall within that rule. Neither Lord *Tenterden* nor Mr. Justice *Littledale* rely on the minute circumstances of the case in delivering their judgments in *Doe v. Turford*.

*Cur. adv. vult.*

The judgment of the Court was now delivered by Lord DENMAN, C. J.—This action was brought by a person who had been declared a bankrupt, against his assignees, for the purpose of disputing the validity of his commission. On the trial it became necessary to inquire whether the plaintiff had been arrested in a particular place (*South Molton-street*) on the 9th of November, 1825, by one *Wright*, a sheriff's officer, who died before the trial, accompanied by a person named *Brett*. To prove that the plaintiff had been so arrested he tendered evidence of two descriptions; both of which the Chief Baron refused to receive; a bill of exceptions was thereupon tendered, and the question was argued on the 9th of May before this Court of error. The first head of evidence rejected consisted of depositions made by two deceased persons on the opening of the commission against the plaintiff, which had been inrolled of record in the Court of Chancery by the defendants as assignees. It was contended that they were admissible against the defendants, *first*, by reason of some supposed privity between them, as assignees, and the petitioning creditor, who must have brought forward the depositions, and to whom the defendants were said to have attorned by acting under the commission; and, *secondly*,

because the assignees had substantially affirmed the truth of the depositions by causing them to be inrolled, and so making them evidence. But no decision or *dictum* was cited in favour of this attempt: no instance was even cited of such evidence ever having been tendered, often as it must have been desirable; and we think the admission of it could not be justified by any principle of law. To prove the same fact, the plaintiff tendered a certificate, written and signed by *Wright*, the deceased sheriff's officer before mentioned, stating in terms that he arrested the plaintiff on the day in question in *South Molton-street*, at the suit of one *Brereton*. The tender of this certificate was preceded by proof, that it was part of the course of the office of the sheriff of *Middlesex* to require a return in writing of the arrest and of the place where it is made, under the hand of the officer making it: that the certificate tendered was annexed to the writ issued against the plaintiff on the 8th of November, 1825, at the suit of *Brereton*, of which writ *Wright* had the execution. The under-sheriff also proved that he could not return a defendant not arrested, when he had got a similar certificate of arrest. The writ and certificate were produced by the under-sheriff. Whether the certificate is evidence of the arrest having been made at the place named in it, is the question which we are now to decide. The ground on which the *Attorney-General* first rested his argument for the plaintiff in error, was not much relied on by him, *viz.* that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. The discussion of this point involved the general

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principles of evidence; and a long list of cases, determined by Judges of the highest authority, from that of *Price v. Lord Torrington*, before *Holt*, C. J., to *Doe d. Pateshall v. Turfard*, recently decided by Lord *Tenterden* (a) and the Court of *King's Bench*, was cited. After carefully considering, however, all that was argued, we do not find it necessary, and therefore think it would not be proper, to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails, the plaintiff in error cannot succeed; and we are all of opinion that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done.

Judgment for the defendants.

(a) 3 B. & Ad. 864.

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FARMER v. CHAMPNEYS, Bart.

THIS was a special demurrer to the declaration, shewing for cause of demurrer that a venue had been inserted in the body of the declaration contrary to the 8th rule of Hilary Term, 4 Will. 4. The Court called upon

The insertion of venue in a declaration contrary to the 8th rule of Hilary Term, 4 Will. 4, is not cause of demurrer.

*Chandless* to support the demurrer.—The rule being made in pursuance of the statute 3 & 4 Will. 4, c. 42, s. 1, has the same efficacy as an express provision of the legislature in prohibiting insertions of the venue. The rule in effect prescribes that the form should be a form without venue. The insertion of the venue in the body of the declaration is, therefore, a deviation from the form prescribed; and it is the office of a special demurrer to point out and to except to any informality of pleading. Besides, this is not a merely technical objection. A question frequently arises whether the insertion of a place is matter of local description or of mere venue. In many instances local description is requisite. Now, if the only mode by which the rule can be enforced is an application to a Judge at chambers, the Judge might strike out as venue the place intended to be a local description, and the opposite party might afterwards demur for want of such description, and the point might be decided either in this Court or a Court of error for want of such description, against the party who had in the first instance correctly inserted it in his pleading.

*Per Curiam*.—It could not have been the intention of those who framed the rules that this should be the subject of demurrer. An application should be made to a Judge at chambers to strike out the venue. That course has frequently been adopted, and is the proper mode of taking advantage of the objection.

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As the point was new the Court allowed an amendment, the costs to be costs in the cause.

A case of *Neil v. Davies* stood for argument on the same point; and the Court, at the prayer of *George*, allowed an amendment on the same terms as in *Farmer v. Champneys*.

### SIGGERS *v.* LEWIS.

To a declaration against the indorser of a bill of exchange, the defendant pleaded that the action was commenced before a reasonable time for the payment of the bill by the defendant had elapsed after notice of dishonour:—*Held, bad.*

**ASSUMPSIT** against the defendant as indorser of a bill of exchange. Plea—that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of non-payment. Demurrer and joinder.

*Mansel*, in support of the demurrer, was stopped by the Court.

*Chandless*, in support of the plea.—The defendant was only bound to pay in a reasonable time after notice of non-payment by the acceptor. That appears from *Walker v. Barnes* (*a*), where it was held that a tender within a reasonable time after notice of dishonour prevented the plaintiff from recovering damages for the time between the notice of dishonour and the tender. If any cause of action arises in such case before a reasonable time has elapsed, the plaintiff, in *Walker v. Barnes*, would at least have been entitled to nominal damages. The question in the present case is, whether the action was not commenced before the cause of action accrued; in other words, whether there was any cause of action before a reasonable time had elapsed. [*Alderson, B.*—According

(a) 1 Marsh. 36; 5 Taunt. 240.

to your argument, every declaration against the indorser of a bill of exchange ought to allege that a reasonable time had elapsed. But nobody ever heard of a declaration containing such an averment. The truth is, that the not paying in a reasonable time after notice is not the cause of action as you argue, but the cause of action is the non-payment on request.] Then the plaintiff, in *Walker v. Barnes*, would have been entitled to nominal damages, as in *Hume v. Peploe* (a), where the acceptor of a bill of exchange was held liable, notwithstanding a tender after the day of payment. It is submitted that the implied contract is to pay in a reasonable time after notice.

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1834.*

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**LORD LYNDHURST, C. B.**—There seems to have been a kind of compromise in *Walker v. Barnes*. The Chief Justice says, that no jury would have given a farthing damages. The contract of the drawer is an undertaking that the acceptor shall pay the bill. Until notice of the acceptor's default is given to the drawer, no action can be maintained; but it is maintainable immediately upon notice being given, if the money is not paid. If an action is improperly commenced, the remedy in such case is by application to stay the proceedings.

**ALDERSON, B.**—If you had a defence arising within a reasonable time after notice of dishonour, you might, *perhaps*, plead it with an averment of its having arisen within such reasonable time. Thus, supposing that *Walker v. Barnes* is a decision which can be supported, you might perhaps be within the principle of that case if you pleaded a tender or payment within a reasonable time after notice of dishonour.

**GURNEY, B.**—After notice of dishonour to the drawer,

(a) 8 East, 168.

*Arch. of Pleas,* he is bound to pay *on demand* (a). The proposition as to  
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 }  
*Singers v.*  
*Lewis.*

*Walker v. Barnes.* Judgment for the plaintiff.

(a) This appears from the form of a declaration against the drawer.

### PEPPERELL v. BURRELL.

Where an order for seven days' time to plead was obtained on the 15th of *May*, and the plaintiff signed judgment on the 22nd, the Court set aside the judgment as having been signed too early, although the pleas which had been delivered on the 22nd were irregular in several respects.

IN this case *Follett* had obtained a rule for setting aside an interlocutory judgment for irregularity, on the ground that the judgment was signed before the time for pleading had expired, an order for seven days' time to plead having been obtained on the 15th of *May*, and the pleas having been delivered on the 22nd, and judgment was signed on the opening of the office on the evening of that day.

*Hutchinson* shewed cause.—The judgment was regular, the plea having been delivered out of time. In *Kay v. Whitehead* (a), it was held that time to plead under a Judge's order is to be reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires; and *Gould*, J., there cited a MS. note of a case, which is decisive of the present, where an order for time to plead was made on the 16th of *May*, and judgment signed on the 23rd for want of a plea, which the Court held to be regular, after consulting the officers (b). Besides, here the pleas were irregularly pleaded. The pleas were, *first*, the general issue; and, *secondly*, payment of the amount claimed by the declaration, concluding

(a) 2 H. Black. 35.

(b) *Sed vide Freeman v. Jackson*,

1 B. & P. 480, where it was held

that both days were computed inclusively.

with a verification, which ought to have been signed by counsel; but the plea was not signed by counsel, and therefore it was a nullity. [Alderson, B.—The plea concluding with a verification not being signed by counsel, may be a nullity; but what becomes of the general issue?] It is submitted that one of the pleas being bad, it vitiates the whole. Besides, no rule to plead several matters was obtained.

*Each. of Pleas,  
1834.*

PEPPERELL  
v.  
BURKELL.

*Follett, contrā.*—By the eighth rule of *Hilary Term, 2 Will. 4*, the seven days are to be reckoned exclusive of the first and inclusive of the last day, and therefore the defendant had the whole of the 22nd to deliver his pleas. Admitting that the pleas were irregular, the plaintiff had no right to sign judgment till the 23rd; and if he had not signed judgment on the 22nd, the defendant might have delivered a new plea. The judgment was therefore irregular on the ground of its being signed too early.

*Lord LYNDHURST, C. B.*—There is no difficulty in this case; the defendant had the whole of the 22nd to deliver his plea; he might, therefore, at any time during that day, have delivered a good plea, but by signing judgment the plaintiff prevented him from doing so. The judgment was signed too soon, and must therefore be set aside.

*ALDERSON, B.*—If the judgment had not been signed too soon, the defendant might have cured the irregularity of his pleas.

*Exch. of Pleas,*  
1834.

PHILLIPS v. ENSELL.

On a motion to set aside a declaration and all subsequent proceedings, on the ground that the defendant has not been served with process, it is not sufficient for the defendant to swear that he has not been personally served with any copy of the process, and that the writ was served by mistake on his brother, who resided in the same house, but he must state further that the copy of the writ served did not come to his possession or knowledge.

**A**DDI<sup>S</sup>ON moved for a rule to shew cause why the declaration and all subsequent proceedings should not be set aside for irregularity, on two grounds: *first*, that the defendant had not been served with any copy of the process; and *secondly*, that the declaration was served too early. The motion was obtained on the affidavit of the defendant, that he had not been served with any copy of the writ of summons, and it appeared from the affidavit of the defendant's brother, who resided in the same house with the defendant, that the writ was by mistake served on him, first, on the 20th of *May*, and that he sent back the copy of the writ served, by the twopenny post the same day to the plaintiff's attorney, with a notice that he had had no conversation with his brother about it. It further appeared, that a copy of the writ of summons was again served on the defendant's brother on the 23rd, when the defendant was in bed; and that the declaration was delivered on the 31st of the same month. The Court granted the rule, though with some reluctance, on the authority of a case of *Thompson v. Phene* (a), decided by Mr. Justice Patteson.

**H**utchinson shewed cause.—The defendant swears that he has not been served with any copy of the process, but he does not swear that it never came to his possession; and it appears from the affidavits that he resides in the same house with his brother, upon whom the process was by mistake served. The defendant does not say that he had no notice of the writ having been served on his brother, and his brother does not swear that he did not

(a) 1 Dowl. P. C. 441.

give it to the defendant, and they both reside in the same house. The brother swears that he was again served with a copy of the writ of summons on the 23rd, but he does not say that he did not communicate that to the defendant, nor does the defendant swear that it did not come to his hands. In *Rhodes v. Innes* (a) service on the son, who said his father was in the house and should receive the writ, was held equivalent to personal service on the father, it appearing that the father had long been eluding the service of the writ. So here, as there can be no doubt that the writ came to the defendant's knowledge, the service is equivalent to personal service. The first service is on the 20th, and the declaration, being delivered on the 31st, is therefore regular.

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1834.

PHILLIPS.  
v  
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*Addison* in support of the rule.—In this case it is clear that there was no personal service on the defendant. [Alderson, B.—There is, according to your affidavit, no service by the person employed by the plaintiff, but it is not sworn that the copy never reached the defendant.] The defendant's brother swears that he sent back the first copy of the writ by the twopenny post, and that he had no conversation with his brother about it. At what time can it be said that it came to the defendant's hands? On the first or the second alleged service. [Gurney, B.—The earliest day if he does not deny it.] In *Thompson v. Pheney* the copy of the process was left with a servant in the shop, the defendant being in an inner room and within hearing of what was going on in the shop, and it cannot be doubted that the servant would communicate it to the defendant. [Alderson, B.—There the servant said, "Mind it's no service." I should conclude from that, that the servant did not serve him, not that he did that which he refused to do.] That, it is submitted, looked like collusion. There is no differ-

*Exch. of Pleas,*  
1834.

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ence between the two cases ; but if there is any it is in this defendant's favour, as it was more probable that it reached the defendant's hands in that case than in the present. In *Rhodes v. Innes* the son said his father was in the house and should receive the writ. [Alderson, B.—There was the same affidavit there as here, that the defendant had not been served with the writ.] At all events the declaration was delivered too early. The plaintiff appears to have given up the first service, and served the writ a second time. If the Court are to look to the probability of the case, it is much more likely that it came to the hands of the defendant on the second service, which was on the 23rd, when it is sworn that the defendant was in bed, than on the 20th, when the brother swears he returned the copy by the post the same day, saying that he had had no conversation with his brother about it.

BOLLAND, B.—I spoke to my brother *Patteson* about the case of *Thompson v. Pheney*, and he said that it was an application made to him on special affidavits to take his opinion, whether the service was a good service on which to enter an appearance. That case does not impugn the case of *Rhodes v. Innes*, where the service was held sufficient; and on the authority of that case, I think that this rule ought to be discharged.

ALDERSON, B.—Upon the authority of the express decision of the full Court of *Common Pleas* in *Rhodes v. Innes*, I think that this rule ought to be discharged. In that case there was the same affidavit, that there had been no personal service. In this case the appearance must have been entered upon the ordinary affidavit of personal service ; and there is nothing to set against that affidavit except the affidavit of the defendant that he has not been *served personally*, which is consistent with his having received it from the hands of his brother, and he does not

say that the writ never got into his possession. *Rhodes v. Innes* is distinguishable from *Thompson v. Phoney*. In the latter case, the probability was that the writ did not come to the hands of the party. But if they were not distinguishable, I should adhere to the opinion of the Court of *Common Pleas*.

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GURNEY, B.—The defendant does not swear that he did not get the writ; and I think, therefore, that fact must be taken against him. The Court entertains no doubt that the defendant was served on the 29th.

Rule discharged.



#### HERRING *v.* BOYLE.

TRESPASS for assault and false imprisonment.—Plea, the general issue. At the trial at the *Middlesex* Sittings in *Easter* Term before Gurney, B., the following appeared to be the facts of the case:—The plaintiff, who sued by his next friend, was an infant about ten years old. He was placed by his mother, who was a widow, at a school kept by the defendant at *Stockwell*. The terms of the defendant's school were twenty guineas a year, payable quarterly. The first quarter, which became due on the 29th of *September*, 1833, was duly paid. On the 24th of *December* in the same year, the plaintiff's mother went to the school and asked the defendant to permit the plaintiff to go home with her for a few days. The defendant refused, and would not permit the mother to see her son, and told the mother that he would not allow him to go home, unless the quarter ending on the 25th of *December* was paid. The mother remonstrated, and said she would pay the quarter's schooling in a short time, but it was not due until the next day. A few days afterwards, the mother went again to the defendant at his school, and demanded from

Defendant, a schoolmaster, improperly, and under a claim for money due for schooling, refused to allow the mother of an infant scholar to take her son home with her, and the son was, though frequently demanded by the mother, kept at school during a part of the holidays, but there was no proof that the infant knew of the demand or denial, or that any restraint had been put upon him; an action of trespass for assault and false imprisonment having been brought by the infant:—*Held*, that it was not maintainable.

*Exch. of Pleas,* him to see her son, and be allowed to take him home with her. The defendant refused. On the 31st of *December*, the mother went again with a friend, and made the same demand; but the defendant refused to let her see the plaintiff, or to allow her to take him home, and he then claimed another quarter's schooling, as a few days of the quarter after the 25th of *December* had then elapsed, and he insisted on keeping the plaintiff until that amount also should be paid. A formal demand was afterwards made, and on a writ of *habeas corpus* being sued out, the plaintiff was sent home, seventeen days having elapsed after the first demand by his mother. No proof was given that the plaintiff knew of the denial to his mother, nor was there any evidence of any actual restraint upon him. On these facts the learned Baron was of opinion that there was no evidence of an imprisonment to go to the jury, and he nonsuited the plaintiff.

*Comyn* obtained a rule to set aside the nonsuit and for a new trial, against which cause was now shewn by

*Hutchinson*, for the defendant.—The nonsuit was right. There was no corporal touch or restraint on the plaintiff. The form of the proceeding in trespass shews that there must be an actual force. It must be laid *contra pacem* and *vi et armis*. Here there was no force or restraint for which either an indictment or an action of trespass *vi et armis* was maintainable.

*Comyn* and *Butt, contrā*.—The boy was sent by his mother to the defendant's school. She had authority to place him in the care of the schoolmaster, and she had authority to determine his continuance there. Now it was proved that the authority from the mother to the master was withdrawn, and the defendant could not justify the detention after such authority was withdrawn. When the rule was

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moved for, Lord *Lyndhurst*, and Mr. Baron *Parke* considered, that, if an action was brought against the schoolmaster, he could only justify by virtue of the authority to detain the boy which was delegated by the mother; and that, if the withdrawal of such authority were replied, it would be an answer to the justification. [Bolland, B.—Lord *Lyndhurst* and my brother *Parke* did not by any means deliver that as their opinion. They threw it out as the most favourable mode of putting the case in your favour.] Here, when the authority to keep the boy was withdrawn, the master persisted in detaining him for the purpose of extortion. [Alderson, B.—The fallacy seems to me to be, that you assume, for the purpose of your argument, that every boy at school is in prison. If that were so, you would go a long way to convince us that when the authority to keep him there is at an end, his remaining at school might be an imprisonment. That however is not so with regard to a boy at school. In the case of a lunatic perhaps it may be different. A person of full age restrained as a lunatic, might probably be taken *prima facie* to be detained against his will.] The assent of a child of such tender years may perhaps be assumed, in the first instance, because the law will presume the assent of an infant to what is for his benefit; but that assent must be taken to be revoked when the contract for schooling is determined by the act of the mother. In the present case, the plaintiff was detained during the holidays, and it may fairly be presumed that a keeping at school during the holidays is against the will of a school-boy. [Bolland, B.—The evidence did not bring the schoolmaster and the plaintiff into contact, so as to shew that there was any the least restraint of the one upon the other.] Every detention against the will is a false imprisonment, and every false imprisonment includes an assault in point of law, so that any argument to be derived from the form of the action for assault is totally unsound. The only question is, whe-

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ther there was any evidence to go to the jury of a detention against the will of the plaintiff. It is submitted that there was. The child was kept through the holidays, and it ought to have been left to the jury, whether that was not against the plaintiff's will. Besides, in the case of a child of such tender years, the will of the parent is to be considered as the will of the child, and in this case the will of the mother was sufficiently expressed. The master declared distinctly that he would detain him until he was compelled by *habeas corpus* to deliver him up; and he was detained at school, and such declaration of the master, coupled with the fact of the boy remaining at school during the holidays, was surely evidence to go to the jury that the master had acted on such declaration and had kept the boy there against the will both of his mother and himself. [Alderson, B.—It is clear that the assent of the plaintiff would put an end to an action in this form; that shews that the will of the mother is not the will of the child. In the present case there was no proof that the master conducted himself to the boy in a different manner in any respect before and after the refusal to deliver him up to his mother; as against the mother he detained him unlawfully; he says in effect to the mother, I will not give him up to you without a *habeas corpus*. That might however be with or without the assent of the boy. The plaintiff was bound to prove his dissent, and not to leave that question in ambiguity.]

*Cur. adv. vult.*

The judgment of the Court was delivered on the next day.

BOLLAND, B.—This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. The facts of the case were these: the plaintiff had been placed by his mother at the school kept by

the defendant, and it appeared that she had applied to <sup>Each of Pleas,</sup>  
<sup>1834.</sup> take him away. The schoolmaster very improperly re-fused to give him up to his mother, unless she paid an amount which he claimed to be due. The question is, whether it appears upon the Judge's notes that there was any evidence of a trespass to go to the jury? I am of opinion that there was not, and, consequently, that this rule must be discharged. It has been argued on the part of the plaintiff that the misconduct of the defendant amounted to a false imprisonment. I cannot find any thing upon the notes of the learned Judge which shews that the plaintiff was at all cognizant of any restraint. There are many cases which shew that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person; but in no case has any conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested; but in the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and therefore I am of opinion that the rule must be discharged.

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ALDERSON, B.—There was a total absence of any proof of consciousness of restraint on the part of the plaintiff. No act of restraint was committed in his presence; and I am of opinion that the refusal in his absence to deliver him up to his mother was not a false imprisonment. My brother *Parke*, who heard the rule moved, but who was not present at the argument, concurs in the opinion of the Court.

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**GURNEY, B.**—This plaintiff complains of an assault and false imprisonment. There was no evidence of any restraint upon him. There was no evidence that he had any knowledge of his mother having desired that he should be permitted to go home, nor that any thing passed between the plaintiff and defendant which shewed that there was any compulsion upon the boy; and there was nothing to shew that he was conscious that he was in any respect restrained.

Lord LYNDHURST stated that he was present when the rule was moved, though he did not hear the case argued, and that he concurred in the judgment.

Rule discharged.

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#### THOMAS *v.* EDWARDS.

Where the under-sheriff refuses to send his notes of the trial, a motion for a new trial must be made on affidavit of the facts.

**KELLY** applied for leave to postpone a motion for a new trial in an action tried before the sheriff, on the ground that the under-sheriff had refused to send up his notes of the trial. He cited a case in which the Court of *King's Bench*, under similar circumstances, had allowed the motion to stand over to a future day.

**PARKE, B.**—You may take a rule. If the under-sheriff persists in refusing to send his notes, the proper course will be to lay the facts proved at the trial before the Court upon affidavit.

Motion granted.

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DUNCAN *v.* GRANT.

THIS was an action of *assumpsit* to recover the sum of £l. 10s. The defendant pleaded the general issue and the Statute of Limitations, and gave notice of set-off. The amount claimed to be set-off was £l. 16s., and the difference between that sum and the amount claimed by the plaintiff was paid into Court. The cause was tried before the under-sheriff, when it was objected that there being another plea on the record besides the general issue, the defendant could not avail himself of the set-off without pleading it; and the under-sheriff, being of that opinion, directed the jury to find a verdict for the plaintiff. A rule for a new trial having been obtained on the ground of misdirection, and of its being a verdict against evidence—

Where the general issue and another plea are pleaded, the defendant is not entitled to give a set-off in evidence upon a notice, but he is bound to plead the set-off.

*Walesby* shewed cause.—There being another plea on the record besides the general issue, the defendant ought to have pleaded the set-off, and not having done so, he was not entitled to avail himself of it on the trial of this cause. In *Webber v. Venn* (a), Lord Chief Justice Abbott said, “ It ought to be generally known, that where any plea is on the record besides the general issue, the set-off cannot, by the terms of the statute, be taken advantage of unless pleaded.”

*C. Jones*, in support of the rule.—In *Coulson v. Jones* (b), Lord *Ellenborough* was of opinion, after hearing the point argued on both sides, and after referring to the words of the 2 Geo. 2, c. 22, s. 13, that there were no restrictive words in that statute confining the right

(a) Ry. & M. 413.

(b) 6 Esp. 50.

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to give a notice of set-off to the case where the general issue is alone pleaded, and that where the general issue was pleaded, with different pleas, the defendant, having given a notice of set-off, was entitled to give evidence of it accordingly. What was said by Lord *Tenterden* was merely an intimation thrown out by him on looking at the record, without the point having been at all raised, a verdict by consent having been taken in the cause.

BOLLAND, B.—I am of opinion that this rule ought to be discharged. The two authorities cited are at variance with each other, but I think the opinion of Lord *Tenterden* is entitled to greater weight as being more consistent with the words of the statute; and I think Lord *Tenterden* would not have thrown out that intimation unless he had formed a deliberate opinion adverse to that of Lord *Ellenborough*.

ALDERSON, B.—I think it is better to adhere to the latest authority. The words of the act are, “That where there are mutual debts between the plaintiff and defendant, or if either party be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue.” The fair meaning of the clause is, that where no special pleas are pleaded, the set-off may be given in evidence upon a notice, other-

wise it must be pleaded. I think Lord Tenterden's opinion is the better founded of the two.

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GURNEY, B., concurred.

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Rule discharged.

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NICHOLLS and Another v. CHAMBERS.

COMYN had obtained a rule to shew cause why the judgment and all subsequent proceedings should not be set aside for irregularity with costs. The cause had been tried before the under-sheriff, by order of a Judge, under 3 & 4 Will. 4, c. 42. The jury process was returnable on the 21st of May; the cause was tried on the 22nd, when the plaintiff obtained a verdict, and the costs were taxed and judgment signed on the 27th of May.

Where a cause was tried before the sheriff under the 3 & 4 Will. 4, c. 42, on the 23rd of May, and the plaintiff having obtained a verdict, costs were taxed and judgment signed on the 27th:—

Held, upon the construction of the 18th section of that act, that the judgment was regular.

Kelly shewed cause.—The judgment was perfectly regular. By the 18th sect. of the 3 & 4 Will. 4, c. 42, it is enacted “That at the return of any such writs of inquiry or writ of trial of such issue or issues as aforesaid, costs shall be taxed, and judgment signed and execution issued forthwith, unless such sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or Judge before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed to a day to be named in such order; and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *Nisi Prius*.” There was here no certificate or order by the sheriff or a Judge to prevent judg-

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ment being signed; and therefore, according to the plain and obvious construction of the clause, the plaintiff was entitled to sign judgment and issue execution immediately. He also cited the 67th rule of *H. T. 2 Will. 4*, to shew that no rule to plead was necessary, which was admitted by

*Comyn*, in support of the rule.—The latter part of the clause, that the verdict shall be as valid and of the like force as a verdict at *Nisi Prius*, confines its operation to the ordinary rule applicable to a verdict at *Nisi Prius*, in which case the unsuccessful party has four days in term to move for judgment or in arrest of judgment, or for a new trial, before the costs can be taxed and the judgment signed. The plaintiff has not availed himself of the former part of the statute, but left the taxation of costs and signing final judgment till the 27th. If the plaintiff does not take out immediate execution so as to give up the costs, it is within the ordinary rule of a verdict at *Nisi Prius*. If this had been a trial in vacation under the 1 *Will. 4*, c. 7, the plaintiff might have applied for immediate execution, but then he must have given up the costs.

**BOLLAND, B.**—I am of opinion that this rule ought to be discharged. A verdict under this act of Parliament does not stand on the same footing as one before the act. The statute enacts, that, at the return of the writ of trial, “costs shall be taxed, judgment signed, and execution issued forthwith;” it then goes on to say, “unless such sheriff, &c. shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, &c.; and the verdict of such jury, &c. shall be as valid and of the like force as a verdict at *Nisi Prius*.” The last part of the clause is consistent with and does not alter the effect of the earlier part of the clause.

**ALDERSON, B.**—The word "forthwith" means that a plaintiff may have his execution as soon as he can get his costs taxed. I do not think that the direction to do it limits the power expressly given. When a Judge gives authority to issue immediate execution, which means as soon as the plaintiff can get his costs taxed, it is not compulsory on the party to issue execution immediately or to wait until after four days in term have elapsed.

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Rule discharged.

### PORTER v. COOPER.

**T**HE first six counts of the declaration were framed upon the following memorandum, signed by the counsel for the prosecutor and defendant, at the *Worcestershire* sessions holden the 3rd of July, 1832, in respect of an indictment which had been preferred at the preceding Assizes for a nuisance. "Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees; the prosecutor giving a copy of the replication one month before the next sessions." The last count was upon an account stated.

A bill of indictment for a nuisance having been preferred and found at the Aprilquarter sessions, 1832, by the plaintiff against the defendant, and the defendant not having filed his plea before the second day of the following sessions, as he was bound to do, accord-

ing to the practice of the sessions, the prosecutor said he should press for judgment for want of a plea, unless the defendant would consent to pay the costs of the day; and the matter being brought before the Court, the Court said that the defendant must either plead and take his trial, or, he might be allowed to traverse on payment of the costs of the day. The parties then conferred together, and an agreement was come to, and the following memorandum was signed by the counsel on both sides:—"Traversed to the next sessions, by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a copy of the replication one month before the sessions." The prosecutor afterwards got his bill of costs taxed, and the defendant was served with a copy of the allocatur, and was applied to for the amount; the defendant objected to two items, which the prosecutor's attorney agreed to take off. The defendant's attorney then offered to give his check for the amount, but not being pressed for, it was not given. The defendant on a subsequent application for payment by the prosecutor's attorney, requested the latter to apply to B. who received his rents, and he would arrange or pay. Held, that what took place at the sessions amounted to an agreement binding on the defendant, independently of the order of the Court, and that taking such agreement together with the promise to arrange and pay after the amount had been ascertained, there was a case to go to the jury on the count on the account stated.

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At the trial before *Patteson*, J., at the *Worcestershire Spring Assizes*, 1834, the plaintiff, in support of his special counts, produced the original indictment, indorsed a true bill, which was objected to by *Maule*, as inadmissible on the authority of *Rex v. Smith* (*a*), and the learned Judge having ruled in favour of the objection, the special counts were abandoned, and the case proceeded on the count on an account stated. In support of this count the evidence was as follows: that, at the *July sessions*, in the afternoon of the second day, the counsel for the prosecution of the indictment, which had been preferred and found at the preceding sessions, complained to the court that the defendant had not filed his plea, alleging that it was the practice of the sessions that it should be filed on the morning of that day. It was proposed to plead to the jurisdiction, which the prosecutor said he should object to, and press for judgment for want of a plea, unless the defendant would allow the prosecutor his costs of the day. The Court conferred together, and said, that the defendant must either plead and take his trial, or he might be allowed to traverse, on payment of the costs of the day. The defendant was then trying prisoners in another court, and his attorney, Mr. *Beale*, went to consult him, and returned, upon which the arrangement was concluded, and the memorandum above set forth signed by the respective counsel. This agreement was embodied in an order of court afterwards drawn up, which directed a taxation of the costs of the day by the deputy clerk of the peace. It further appeared, that the bill of the prosecutor's costs was taxed by the deputy clerk of the peace at 43*l.* 8*s.*, and that the defendant's attorney had a copy of the allocatur, and was applied to for the amount, upon which he wrote to the prosecutor's attor-

ney, that the defendants had looked over the bill, and thinking there was some mistake in it, he proposed taking the opinion of the Court at the approaching sessions. At those sessions, accordingly, the counsel for the prosecution inquired what was the objection intended to be urged by the defendants, and was answered, that it went to the allowance of one guinea and eight shillings; and it was proposed to refer the bill back to the deputy clerk of the peace. The prosecutor's attorney said there was no occasion to do that, and consented to disallow the two items, whereupon the defendant's attorney offered to give his check then for the balance; it was not, however, pressed for, and was not given, and afterwards it was refused. In a subsequent conversation between the defendant and the prosecutor's attorney on the 19th of November, 1832, the former requested the latter to apply to Mr. *Beale*, who received his rents, *and he would arrange or pay*. Upon application made to Mr. *Beale*, that gentleman, however, refused. It was objected, on these facts, that there was no evidence to go to the jury upon the count on the account stated. The learned Judge thought otherwise, and left the case to the jury, giving the defendant leave to move to enter a nonsuit. A verdict having passed for the plaintiff, *Maule*, in Easter term last, obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered.

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*R. V. Richards* and *G. T. White* now shewed cause.—The ground upon which this rule was obtained was, that there was no sum of money due from the defendant to the plaintiff, which could form the subject matter of an account stated; and *Emerson v. Lashley* (a) was mainly relied on. There it was holden that an action would not lie, to recover costs ordered to be paid by an interlocu-

(a) 2 H. Blac. 248.

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tory rule in the lord mayor's court. That case, however, is wholly unlike the present; for here a sum of money was due from the defendant to the plaintiff, recoverable by action at law, before the stating of the account between them. Admitting, however, that no such sum was due, there is such express evidence of an account stated between the parties as will make that form of action maintainable. To bring this case within the principle of *Emerson v. Lashley*, it ought to have appeared that the order of the court of quarter sessions proceeded from the breast of the court, instead of being merely ancillary to an agreement previously entered into between the plaintiff and the defendant. The note on the counsel's briefs, signed by them on both sides—"traversed to the next sessions by consent, the defendant paying the costs of the day," amounts to a distinct and complete agreement for the payment by the defendant of the costs of the day, in consideration of a forbearance shewn to him by the plaintiff, in consenting to his traversing to the next sessions. Upon this agreement an action was maintainable, and it is not the less so because the Court of quarter sessions approved of the agreement, and sanctioned it, by making an order in conformity therewith, for the disobedience of which order, it is quite immaterial whether or no there would have been a remedy by attachment or otherwise. What fell from Mr. Baron Parke, in the case of *Wentworth v. Bullelen* (b), is in point. "Now, though there is no remedy for disobedience of a Judge's order, as such, by one of the parties against another by action, but by attachment merely, yet, if it be made by consent of both, and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a Judge's order. The contract of the parties is not less a contract, and subject to the inci-

dents of a contract, because there is superadded the command of the Judge. The case of an agreement to refer by order of a Judge is a familiar instance, many actions being brought upon such agreements." This argument derives further confirmation from the case of *Riley v. Byrne* (a). There, after notice of trial, the cause was compromised, the defendant agreeing to apologise and pay the plaintiff's costs as between attorney and client. The apology was made and accepted, and a rule of Court was afterwards made in the cause, ordering the payment of 67*l.* 13*s.*, the costs of the action, and 7*l.* 15*s.*, the costs of applying for the rule. And the Court of King's Bench held, that the undertaking entered into by the defendant was such as to constitute a debt proveable under the commission; that the defendant had agreed, upon good consideration, to pay what should be found due for the plaintiff's costs, and the Master's allocatur operated as an award. In like manner here, the defendant agreed, upon good consideration, to pay the plaintiff his costs of the day, and the deputy clerk of the peace's allocatur operated as an award. *Jacobs v. Phillips* (b) is distinguishable, as in that case the order was *in invitum*, and there was nothing therefore from which an agreement could be inferred.

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Admitting, however, for the sake of the argument, that there was not in this case a sum of money due from the defendant to the plaintiff recoverable by action at law, still there is such express evidence of an account stated between the parties as makes that form of action maintainable. The consent of the parties was indorsed by their respective counsel on their briefs. An order of Court was made to effectuate that consent. Afterwards the costs were taxed at 43*l.* 8*s.*, and this having been done the parties met at the subsequent sessions; an objection having been taken to two items, one of a guinea and the other of

(a) 2 Barn. & Adolph. 779.

(b) 1 C. M. & R. 195.

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eight shillings, that objection was allowed on the part of the plaintiff, and the defendant's attorney told him that he would give his check for the difference. It was also proved that the plaintiff's attorney afterwards saw the defendant himself, and was referred by him to Mr. *Beale*, who he said received his rents, and who would arrange or pay. The above evidence was of itself sufficient to support the count upon an account stated, whether or no there was a cause of action before and independent of that account. This view of the sufficiency of evidence in support of such a count, is strongly illustrated by *Peacock*, Administrator, v. *Harris* (a), and *Knowles* and Others v. *Michel* and Another (b). In the former of those cases, a collector of tolls, though not legally appointed, was holden entitled to recover upon a count for an account stated, the amount of tolls for which he had credited the defendant passing through the gate, upon the strength of a recognition by the defendant of the collector's title to the tolls: and in the latter a verbal admission, made after the felling and taking away by the defendant of certain trees, that so much had been agreed to be paid for them whilst standing, was holden sufficient to support a count upon an account stated. Lastly, the defendant is not entitled to a nonsuit, for the learned Judge improperly rejected evidence on the authority of *Rex v. Smith*. [Parke, B.—We will first hear the other side; and, if they satisfy us that you are wrong on the points you have already urged, we will then hear you upon the last question.]

*Maule* and *Curwood*, in support of the rule.—The plaintiff cannot recover at all. If there had been an agreement to pay a certain sum for costs, or to pay the costs to be afterwards ascertained, an action for them might have been maintained. But here there was no

agreement. The result of the evidence is, that on the two parties coming into Court, an arrangement was made by their counsel to adjourn the case, on certain terms. This arrangement could only be carried into effect by the Court, and, as soon as the order of Court was made, the contract was performed. [Parke, B.—That is true, if the contract were only to adjourn the case; but it is said, that the contract was to pay the money.] If the agreement was, that the prosecutor and the defendant should put themselves in the situation of parties bound by a rule of Court, no action is maintainable, and the indorsement on the briefs was merely ancillary and introductory to the order. Then, as to the account stated, there was no evidence to go to the jury of an account stated. The reference by the defendant to his attorney was merely to see whether he would arrange or pay. [Alderson, B.—“Go to my attorney, who receives my rents, and he will either arrange or pay,” seems an expression that ought to be left to the jury. You must not forget that it had been discussed before in open Court, and two items rejected. Parke, B.—It is only for us to say whether there was evidence to go to the jury. It was for them to say what was the meaning of those words. The word “arrange” may mean two things. It was clearly a question for them.] It may be admitted that what the defendant said would have been sufficient evidence, if it had appeared that an action was originally maintainable. But it would be dangerous to hold that a mere statement of account will give a right of action where an action was not originally maintainable. The cases of *Knowles v. Michel* and *Peacock v. Harris*, which have been supposed to support such a proposition, on investigation will be found not to do so. [Alderson, B.—The count on the account stated speaks of a sum due and owing. Parke, B.—Does it not come to this, whether an action could have been maintained on this agreement when executed?]

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PARKE, B.—I think that this rule ought to be discharged, and that there was evidence to go to the jury in support of the count on an account stated. I agree with what has fallen from my brother *Alderson* in the course of the discussion, that, in the later cases, the Courts have deviated far from what was the original meaning of an account stated. I take the rule to be this, that, if there is an admission of a sum of money being due, for which an action would lie, that will be evidence to go to the jury on the count for an account stated. There was, indeed, no express evidence of the admission of the defendant of any previous sum being due; but the amount was conditionally admitted, two items being objected to. The amount had been taxed by the deputy clerk of the peace, and on its being proposed to refer it back to him, the two items were abandoned. The allocatur had been served, so that the defendant was aware of what the plaintiff claimed. Then there was a personal application to the defendant to pay, upon which he said, “Go to Mr. *Beale*, who receives my rents, and he will arrange or pay.” Now, as the defendant knew the amount claimed, it was clearly for the jury to say what was the meaning of this expression, and to consider whether it did not amount to an admission of his liability under the agreement, and a promise to pay.

This reduces the case to the question whether an action was originally maintainable, as on an agreement, or whether there was merely an interlocutory order, on which the party could proceed only by process of contempt. To make out that the action would have lain, it is necessary to shew that there was an agreement between the parties, and that depends on what took place at the sessions. It seems to me that what occurred there would have amounted to an agreement, independently of the order of Court. It appears that the defendant was bound to plead, and was not ready with his plea. The prosecu-

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tor's counsel stated in Court that he should press for judgment then, unless the defendant would consent to pay the costs of the day. It was mentioned to the Court, who recommended the parties to come to terms, and they afterwards treated together, and came to an agreement, which amounts to this: that, in consideration that the prosecutor would forego his right of insisting for an immediate judgment, the defendant promised to pay the costs.

This appears to me to be a binding agreement, totally independent of the order of sessions, and in that view of the case an action was maintainable on the original agreement. This rule must therefore be discharged.

**BOLLAND, B.**—I am of the same opinion. If the case had depended on the order of sessions merely, I should have been of a different opinion. There was, however, evidence of an agreement, independently of the order of sessions; and Dr. Cooper, who was aware of the amount claimed, referred the plaintiff to his attorney, and said that he would arrange or pay; and the jury have put the construction upon those words which I think they ought in fairness to have put upon them. It seems to me, therefore, that the action was maintainable on the count for an account stated.

**ALDERSON, B.**—I am of the same opinion. The case has come to this, that an admission of a certain sum being due in respect of a demand for which an action would lie, is evidence sufficient to support a count on an account stated. Now, in this case, was there not a demand? It is said that an action will not lie on an interlocutory order of Court. All that the court of sessions appear however to have done in this instance was, the communicating that they would not object to what the parties should arrange. Afterwards the parties do come to an arrangement, and the Court give

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their sanction, but the arrangement proceeded by the consent of the parties. The amount of the costs was subsequently ascertained, and there was evidence of a promise to pay. On this state of facts, I think that the count on an account stated was maintainable.

GURNEY, B., concurred.

Rule discharged.

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BARKER v. WEEDON.

Where the writ of summons was "in an action on the case," and the affidavit to hold to bail was for goods sold and delivered, and the amount of the debt was indorsed on the writ: *Held*, that the writ was irregular, and that the defendant was entitled to be discharged out of custody.

A writ of summons directed to the "sheriff of Middlesex" is irregular.

A RULE had been obtained by *Heaton* for setting aside the writ of *capias* for irregularity, and for discharging the defendant out of custody, on the ground that on the face of the writ it was to answer the plaintiff in an action on the case, the affidavit to hold to bail being for goods sold and delivered. The amount of the debt was indorsed on the writ.

*W. H. Watson* shewed cause.—The writ is good. The direction in the statute is to answer the plaintiff in an action on promises (debt, &c.). Now, as a person may be holden to bail in case by a Judge's order, the writ is not necessarily void. [*Alderson*, B.—The writ is incongruous, the indorsement being for a debt, and the writ in case]. The indorsement is no part of the writ. [*Parke*, B.—You cannot have a good declaration thereon, and therefore, as to discharging the defendant out of custody, you can have no answer]. If the declaration was in debt, the Court would not set it aside unless the plaintiff applied immediately. [*Parke*, B.—You cannot have a good declaration on this writ, that is clear; and why should we keep the defendant in custody till the plaintiff

chooses to declare?] At all events, the defendant by his rule asks too much.

*Barker v. Weedon.*

*Heaton, contra.*—The writ ought to be set aside, the indorsement being in debt, the affidavit to hold to bail in debt, and the writ in case, which is irregular. [Parke, B.—We are of opinion that the writ is regular; a party may be holden to bail in case; the indorsement is no part of the writ: but the arrest is irregular; and therefore the rule should be absolute without costs.]

*Heaton* then objected that the writ was directed to the “sheriffs” of *Middlesex*, which was irregular, the two individuals filling the office of sheriff of *Middlesex*.

*Watson*.—The writ is substantially correct, and this is not such an irregularity as can mislead; and the Court will not set aside a rule with costs for such a trifling oversight, which is not absolutely incorrect.

*Parke, B.*—This irregularity is fatal; the Courts require great strictness in writs. The office is that of “sheriff” of *Middlesex*; the rule must be absolute with costs.

The other Barons concurred.

Rule absolute, with costs.

*Exch. of Pleas,*  
1834.

Doe dem. Lewis, Esq., v. Cawdor.

The father of the defendant, and, after his death, the defendant, had held lands by the permission of and under the father of the lessor of the plaintiff, and after the death of the father of the lessor of the plaintiff, the defendant continued to hold the lands. To shew that the tenancy was determined, the lessor of the plaintiff offered in evidence the following letters. The first was a letter written by the defendant to the plaintiff, in which, after acknowledging the receipt of a letter from the plaintiff on the subject of the premises in question, he says, "As the circumstances in it are not within my knowledge, I

have placed it in the hands of Messrs. F., and have requested them to communicate with you." The second letter, which was from Messrs. F. to the plaintiff, was as follows: "Earl C. (the defendant) has given us a letter from you on the subject of some ground you state to have been let by the late Mr. L. (the father of the lessor of the plaintiff) in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late earl's own." Another letter from Messrs. F. requested further information "as to the late Mr. L. having a right to let the piece of ground in question to Earl C., as it appears to us that the mere fact mentioned in your letter at the utmost only shews that Mr. L. might claim it, and not at all aver that Lord C. admitted it even on the representation of his own agent." Held, that those letters did not amount to a disclaimer.

A disclaimer, in such case, must be before the date of the day of the demise.

An admission, made after the day of the demise, of a disclaimer, must, to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of demise.

Held, also, that the letter of the defendant did not confer on the agent any authority to bind the defendant by making a disclaimer.

THIS was an ejectment brought to recover a smelting house and foundry near *Llanelly*, in *Caermarthenshire*. The day of the demise laid in the declaration was the 2nd of *March*, 1830. At the trial before *Bosanquet*, J., at the last *Summer Assizes* for the county of *Caermarthen*, the plaintiff's case was—That, in the year 1812, his father, who was the confidential agent of the late Lord *Cawdor*, the father of the defendant, had permitted him to build the works in question for the purpose of smelting lead ore, on a spot of waste ground called the *Hook*, which adjoined and was parcel of a farm called *Penrhose*, the property of Mr. *Lewis*, on an understanding that a lease should be granted, on terms to be subsequently arranged; that the works were accordingly built in the year 1812, but abandoned in a few years, and subsequently let by Lord *Cawdor's* agent to the present occupiers, Messrs. *Waddle*, as an iron foundry. The late Lord *Cawdor* died in 1821. Mr. *Lewis* died in 1829, and in a few months afterwards his son and heir-at-law, the lessor of the plaintiff, applied to Lord *Cawdor's* agents, and subsequently to Lord *Cawdor* himself, requesting that some arrangement might be made respecting the terms on which Lord *Cawdor* was to hold the works as tenant to the lessor of the plaintiff. The following letters from Lord *Cawdor* and

his solicitor, Mr. *Farrer*, were the result of that applica-

*Exch. of Pleas,*  
1834.

“ *Grosvenor Square, March 3rd, 1830.*

“ Sir,—I beg to acknowledge the receipt of your letter on the subject of the lead works at *Llanelly*. As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. *Farrer*, and have requested them to take an early opportunity of communicating with you.

“ Yours, &c.

“ *David Lewis, Esq.*

“ *Cawdor.*”

“ Sir,—Earl *Cawdor* has given us a letter from you on the subject of some ground you state to have been let to the late Mr. *Lewis* in 1811, and which has ever since been in the possession of his Lordship's family. We will thank you to let us have the proofs that it was not the late Lord's own, as you are aware the subject is one that the present Earl is totally unacquainted with, except from your letter.

“ *March 4th, 1830.*

“ Yours, &c.

“ *— Lewis, Esq.*

“ *Farrers & Co.*”

“ Sir,—I should be very glad if you would furnish further information than that contained in your letter of the 6th of *March* as to the late Mr. *Lewis* having a right to let the piece of ground in question to Earl *Cawdor*, as it appears to me that the single fact mentioned in your letter at the utmost only shews that Mr. *Lewis* might claim it, and not at all aver that Lord *Cawdor* admitted it even on the representation of his own agent. However, I hope to see Mr. *Williams* either at the *Hereford Assizes* or in town soon, and will then enter upon the subject with him.

“ Yours, &c.

“ *March 10th, 1830.*

“ *Thomas Farrer.*”

Doe  
d.  
LEWIS  
v.  
CAWDOR.

*Ezek. of Pleas,*  
1834.

Don  
d.  
Lewis  
v.  
Cawdor.

At the close of the plaintiff's case, the defendant's counsel submitted that even if the plaintiff's case were taken to be proved as opened, notice to quit was necessary. But the learned Judge was of opinion that the letters in question amounted to a disclaimer, which rendered a notice to quit unnecessary. The defendant's case was then gone into, and it was contended on his behalf that the ground on which the works had been built was not parcel of *Penshros* farm, but of the wastes of the manor, of which Lord Cawdor was the lord. The learned Judge told the jury that if they thought, upon the evidence, that the works had been built on the land of the late Mr. Lewis by his permission, they were to find for the plaintiff. A verdict having passed for the lessor of the plaintiff—The *Attorney-General*, in *Michaelmas Term* last, obtained a rule to enter a nonsuit according to leave reserved by the learned Judge, on the ground that the above letters did not amount to a disclaimer.

The case was argued in *Easter Term* by *John Evans* and *E. V. Williams* for the plaintiff, and by the *Attorney-General*, *Wilson*, *Chilton*, and *Whitcombe* for the defendant. The Court took time to consider. The judgment of the Court was now delivered by

**PARKE, B.**—This was an ejectment brought against Lord Cawdor for the recovery of certain property which had been enjoyed by the father of the present Lord Cawdor under the father of Mr. Lewis, the lessor of the plaintiff. The chief question for the opinion of the Court was, whether the letters which were given in evidence in this cause amounted to a disclaimer of the title of the lessor of the plaintiff. It appeared that the premises had been held under such circumstances as that it became necessary for the lessor of the plaintiff to shew a determination of the tenancy; and it was contended on his behalf that the

letters in question amounted to a disclaimer, which put an end to any tenancy which subsisted between the parties.

The learned Judge who tried the cause thought that the letters did amount to a disclaimer, but in that opinion the Court does not concur. We think that the letters did not amount to a disclaimer; and, even if they did, such disclaimer would not be sufficient; because the letters were written after the day of the demise; and if they are put as an admission of a previous disclaimer, it is clear that they ought to amount to a recognition of a disclaimer antecedent to the date of the day of the demise. Besides, there was nothing in evidence in the cause to shew that Mr. *Farrer* had any authority, or was competent to bind Lord *Cawdor* by any disclaimer on his part.

The action, therefore, was not maintainable, unless the lessor of the plaintiff can make out in some other way that something had passed which amounted to a determination of the tenancy. It has been argued that the facts of the case shewed that the tenancy was one strictly at will only, and therefore that it was determined by the death of the late Mr. *Lewis*. That point, however, was not taken at the trial; if it had, *non constat* but that the defendant might have given evidence of circumstances which amounted to a new tenancy. The result is, that the rule must be absolute for a new trial, not for a nonsuit, because it may turn out that the death of the late Mr. *Lewis* finally determined the tenancy.

Rule absolute for a new trial.

*Eccles. of Pleas,*  
1834.

Doe  
d.  
Lewis  
v.  
Cawdor.

*Exch. of Pleas,*  
1834.

MUDRY v. NEWMAN and Another.

Where, on a motion for judgment as in case of a nonsuit, it appeared that the action was commenced and carried on in the plaintiff's name without his authority or knowledge; and that the attorney could not be found after diligent inquiry:

Held, that this was no answer to the motion, and that the plaintiff's only remedy was against the attorney: but, the Court, under the circumstances, enlarged the rule to give the plaintiff time to find the attorney, and granted a rule to shew cause why the attorney should not pay the defendants' costs.

**PETERSDORFF** in a former term obtained a rule to shew cause for a judgment as in case of a nonsuit for not proceeding to trial. That rule was afterwards enlarged until the present term, in order to enable the defendants to find *Pinero*, the plaintiff's attorney; but, the defendants not having been able to find him, the rule was served personally on the plaintiff.

The affidavits to oppose the rule stated that *Mudry* was a Frenchman and had been applied to by *Pinero* in 1822 to lend his name to an action against the defendants; that *Mudry* consented to become a witness, but had never authorized the use of his name in this action; that *Pinero* had notwithstanding employed *Mudry's* name as plaintiff in this action without his knowledge, and that issue had long since been joined therein. *Mudry* likewise swore that he was ignorant of the existence of the action until the present rule was served upon him; and it moreover appeared that diligent search had been made both by the defendants and the plaintiff to find *Pinero*, but without success.

*Beldam* shewed cause.—The attorney *Pinero*, and not the plaintiff, is liable to pay the costs. *Doe dem. Davies v. Eyton* (a). As a question of ordinary justice, it is not fair between two parties equally innocent, to permit one of them to shift his burthen upon the other; in ordinary cases the rule is, that one person shall not be prejudiced by the unauthorized use of his name; and there seems no reason why the misconduct of an attorney of this Court should be an exception to the general rule. The case cited appears to

(a) 3 B. & Ad. 785.

shew that the attorney under such circumstances may be considered as *primarily* liable to the defendants. [Parke, B.—That case differs from this, for there the motion was made by the plaintiff, and the attorney was not out of the way.] But the defendants in that case, in order to avoid circuity, were permitted to join in the motion, and they obtained costs at once against the attorney.

*Exch. of Pleas,*  
1834.

MUDRY  
v.  
NEWMAN.

PARKE, B.—I fear the plaintiff's only remedy is an action against *Pinero* for commencing the action without his authority. The case is one of great hardship, and we think the rule should be enlarged, in order to enable the plaintiff to find *Pinero*: and the plaintiff may, on resiling his affidavits, take a rule against *Pinero*, to shew cause why he should not pay the costs to the defendants; and both rules may come on together.

The other Barons concurred.

Rule accordingly.

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Courts of Exchequer

AND

## Exchequer Chamber.

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EXCHEQUER OF PLEAS, MICHAELMAS TERM, 5 WILL. IV.

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### MEMORANDA.

ON the 7th of July, *Frederick Thesiger*, of the *Inner Temple*, Esq., was appointed his Majesty's Counsel; and *Matthew Devonport Hill*, of *Lincoln's Inn*, Esq., received a patent of precedence to rank after Mr. *Thesiger*. Also, on the same day, *William Erle*, of the *Inner Temple*, Esq., was appointed his Majesty's Counsel.

On the 2nd of August, *Cresswell Cresswell*, of the *Inner Temple*, Esq., was also appointed one of his Majesty's Counsel.

Exch. of Pleas,  
1834.

**Doe dem. ORLANDO HARRIS BRIDGMAN, Esq. v. EVAN DAVID and Others.**

**EJECTMENT** for the recovery of a mansion-house and lands called *Manor Court*, situate in the county of *Carmarthen*.

Lease for twenty-one years to *A. B.*, his executors, administrators, and assigns. Proviso, that if *A. B.*, his executors, administrators, or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him whereby any reasonable probability might arise of the estate being extended &c., the estate should determine and the lessor have power to re-enter. *A. B.* died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt: —*Held*, that the lessor's right of re-entering thereupon accrued.

At the trial before *Parke*, B., at the last Assizes for the county of *Carmarthen*, it appeared that the premises in question were demised by the lessor of the plaintiff by lease bearing date the 30th *December*, 1816, to *Joseph Waters*, Esq., his executors, administrators, and assigns, for the term of twenty-one years from *Michaelmas*, 1816, at a yearly rent of 88*l.* The lease contained various covenants, and, amongst others, a covenant for payment of the rent; and after these followed a proviso, that, if the rent should be in arrear for a certain time, or any of the covenants should not be performed, the lease should be void. Then followed the proviso, upon which it was contended for the lessor of the plaintiff that the forfeiture of the lease had been incurred—“ Provided also, that, if the said *Joseph Waters*, his executors, administrators, or assigns shall become bankrupt or bankrupts, insolvent or insolvents, or suffer any judgment or judgments to be entered against him or any of them the said *Joseph Waters*, his executors, administrators, or assigns, by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him whereby any reasonable probability may arise of the said herein and hereby demised estate, or any part thereof being extended or taken in execution; that then and in any or either of the said cases in this proviso mentioned happening, this present indenture of lease and the estate and interest hereinbefore and hereby granted, and every grant, clause, and thing herein contained on the part and behalf of the said *Orlando Lloyd Harris*, or his assigns, and the person or persons for the

*Exch. of Pleas.* time being entitled to the perception of the rents and profits of the said hereinbefore and hereby demised estate shall cease, determine, and be utterly null and void to all intents and purposes, as if this present indenture had never been made, and that then and in any or either of such cases of forfeiture happening, it shall and may be lawful to and for the said *Orlando Lloyd Harris*, or his assigns, or the person or persons for the time being entitled as aforesaid into and upon the said demised estate, lands, and premises, or any part or parcel thereof, in the name of the whole to re-enter, and the same and every part and parcel thereof to have again, re-possess, and re-enjoy, as in his and their former estate; and the said *Joseph Waters*, his executors, administrators, and assigns thereout to expel, remove, and put out, this indenture, or any thing herein contained to the contrary thereof in anywise notwithstanding."

*Joseph Waters*, the lessee, entered upon the premises, and died in the year 1823, leaving *Robert Waters* and *John Waters*, his brothers, executors of his will. By this will the property in question was bequeathed to them, their executors, administrators, and assigns upon trust to raise an annuity for the benefit of the testator's widow, and, subject to such annuity, in trust for the benefit of his son. *Robert Waters* died in 1827, leaving *John Waters* sole executor and trustee, and in 1832 *John Waters* became a bankrupt, and a fiat was issued against him. Upon this the present action was brought, and it was contended that *John Waters* having become bankrupt, the lease was rendered void by the proviso set forth. The learned Baron directed a verdict for the plaintiff, but gave leave to the defendants to move to set that verdict aside and have a nonsuit entered.

*E. V. Williams* now moved accordingly.—The question is, whether the bankruptcy of *John Waters*, the executor

of *Joseph Waters*, the original lessee, operated under the terms of the proviso as a forfeiture of the term. In strict construction the case comes within the words of the clause which declares that the bankruptcy of the lessee or of his executors shall render the lease void. But, in construing a proviso of this nature, imposing the forfeiture of an estate, the Court will not give a larger operation to the words than they require; and, if it can be shewn that the terms of the proviso may be satisfied without extending them to a case like the present, the Court will favour the more lenient construction. To bring the case within the proviso, it must appear to be within the spirit of that clause. Now, the object of the lessor in framing that clause, was, to guard against involuntary alienations, or alienations *in invitum* by the tenant. This appears from the subsequent part of the proviso relating to extents &c., "whereby any reasonable probability may arise of the estate or any part thereof being extended or taken in execution." The lessor was anxious to preserve the estate in the hands of the original lessee and his representatives, and to prevent any alienation of it unless with his consent. [Lord *Lyndhurst*, C. B.—The executor would be liable on the covenants, and was it not the object of the lessor to have a substantial person as tenant; otherwise he might lose the benefit of his covenant? *Parke*, B.—The lessor wished to have a solvent tenant, and not an insolvent one. Lord *Lyndhurst*, C. B.—A very strong case must be made out to prevent the operation of the express words of the proviso.] *John Waters* being at the time of his bankruptcy a mere trustee of the property, it would not pass to his assignees, and therefore the object of the testator, *viz.* that it should remain with the lessee or his representative was not defeated by his bankruptcy. This construction will not render the words of the proviso inoperative, because the word "executors" may have been inserted to provide against the bankruptcy of the executor as such. An ex-

*Exch. of Pleas,*  
1834.

DOR  
*v.*  
DAVID.

*Exch. of Pleas,* ecutor may become a bankrupt in his representative capacity, as, where by the directions of the testator he carries on his business, and in the course of that trading commits an act of bankruptcy (a). [Lord *Lyndhurst*, C. B.

1834.  
Doe  
v.  
David.

—Does *Joseph Waters*, the testator, direct his executors to carry on the business?] The will “authorises, empowers, and directs” the executors to carry on such of his different concerns as they may deem prudent or advisable. [Lord *Lyndhurst*, C. B.—The words of the proviso being clear and definite, are to be taken in their ordinary sense, and are not to receive a restricted meaning unless it be shewn that they bear that meaning and that meaning only.] The Court will not lean to such a construction of the clause as will induce a forfeiture of the estate of a legatee who has no power over the acts of the executor, and though the argument of hardship cannot be urged alone, yet it may be made use of as leading to the proper construction of the proviso. [Lord *Lyndhurst*, C. B.—The lessor could have no knowledge of the nature of the will which the lessee would make; he looked only to the executors.]

Lord LYNDHURST, C. B.—There is no ground for granting a rule in this case. The words of the proviso with regard to bankruptcy are general, “Provided that if the said *Joseph Waters*, his executors, administrators, and assigns, shall become bankrupt or bankrupts,” the lease shall become void. It has been argued that the word “executors” is used in a particular and restricted sense; but there appears to be no ground for that presumption. The proviso in question follows immediately after another proviso, where no such restricted sense could be intended to attach to the word executors as there used, and there is

(a) See *Ex parte Garland*, 10 Ves. 117; *Eden's Bankrupt Law*, 5, 3rd edit.; *Thompson v. Andrews*, 1 Mylne & Keene, 116.

nothing to shew that the word was not meant to have the same sense in both the provisoes. There is quite sufficient reason for construing the word in its ordinary acceptation. The object of the lessor was to guard against having an insolvent tenant imposed upon him. He was aware that the obligation to perform the various covenants in the lease would, on the death of the lessee, devolve upon his executor, and he was desirous that the executor, when he became his tenant, should not be insolvent or bankrupt, and so deprive him of the benefit of the covenants. There appears therefore not only to be no reason for a restricted sense, but, on the contrary, strong grounds for taking the words in their ordinary sense.

*Exch. of Pleas,  
1834.*

DOS  
v.  
DAVID.

**ALDERSON, B.**—I am of the same opinion. The rule of construction is, that words are to receive their natural meaning, unless some strong reason can be shewn to give them another sense. The words here are, that, if the executor becomes bankrupt, the lease shall be void. Why should not that consequence follow? It is very improbable that the parties should have contemplated the executor becoming bankrupt as such.

**PARKE, B.**—I see no reason to change the opinion I entertained at the trial. It is clear that the lessor did not wish to have an insolvent tenant.

**GURNEY, B.**, concurred.

Rule refused.

*Exch. of Pleas,*  
1834.

BASTABLE v. POOLE.

*A.*, the payee of a bill of exchange, delivered it to *H.* to get it discounted. *H.* carried it to *B.*, who refused to discount it unless *H.* would indorse it, which he did. *B.* then discounted the bill, but paid over only a portion of the proceeds, and procured it to be discounted. *A.* being compelled to take up the bill at maturity, sued *B.* for the balance left unpaid:—*Held,* that *A.* was entitled to recover, and that the question for the jury was, whether *A.* was in fact the owner of the bill, and not whether *H.* had so represented him to be, in discounting the bill with *B.*

**A**SSUMPSIT for money had and received. Plea, the general issue. At the trial before *Bolland, B.*, at the last Sittings in *London*, the following appeared to be the facts of the case. The plaintiff, a wine merchant in the city of *London*, being desirous of raising a sum of money, procured a friend named *Terry* to accept a bill for 65*l.* 10*s.*, drawn by the plaintiff, and payable to his own order. The bill being accepted and indorsed, was handed over by the plaintiff to a person named *Harvey* (who was the witness called to prove these facts), with directions that he should get it discounted. *Harvey* accordingly carried the bill to the defendant, a bill-broker, and applied to him to discount it, telling him at the same time that it was *Bastable's* (the plaintiff's) bill. The defendant desired *Harvey* to leave the bill, and call again the next day, which he did, when the defendant said that he would do it provided *Harvey* would indorse it. *Harvey* then indorsed the bill, telling the defendant that he had no interest in it, and that he indorsed it to facilitate the cashing of it. The defendant then paid him 10*l.* on account of the bill, and subsequently a further sum of 10*l.*, which were the only payments he made. The defendant having thus obtained possession of the bill, discounted it with a person named *Gomersall*, and when at maturity the plaintiff was called upon to pay the amount to the holder. Upon his cross-examination, *Harvey* stated that he had had other bill transactions with the defendant, and that upon those occasions he had been in the habit of indorsing the bills which he had procured the defendant to discount. It appeared, also, that he had himself been a creditor of the defendant to the extent of 40*l.*, the balance of other bill transactions. For the defendant it was urged that the credit was given to *Harvey*, and not to the plaintiff, and that this appeared from the

general course of dealing between those parties, and that the jury were to weigh the acts of *Harvey*, as they appeared from the other transactions between him and the defendant, against his statements made at the trial, of his having represented this bill to be the property of *Bastable*. The learned Baron, in summing up, told the jury that the case rested entirely on the evidence of *Harvey*, and upon the fact of his stating to the defendant that the bill was the property of the plaintiff; that, if they thought that *Harvey's* putting his name upon the bill was not for the purpose of making himself liable to the defendant, and that the defendant did not take the bill upon his credit, they should find a verdict for the plaintiff, but that, if they thought that *Harvey* indorsed the bill for the purpose of making himself liable, and that the defendant discounted it upon that idea, they should find for the defendant. The jury having found a verdict for the defendant, *J. Jervis*, in the early part of this term, obtained a rule for a new trial, on the ground of misdirection, and also on the ground of the verdict having been against evidence.

*Exch. of Pleas,  
1834.*

BASTABLE  
*v.*  
POOLE.

*Butt* now shewed cause.—There is no ground for setting aside this verdict on account of a misdirection by the learned Baron. He left the case to the jury upon the testimony of *Harvey*, the only witness in the cause, directing them that, if they believed *Harvey*, that is, if they believed that he represented himself as having no interest in the bill, but that it was the property of the plaintiff, the latter was entitled to recover; but that, if they did not believe him, that is to say, if they believed that he represented himself as being the person interested in the bill, and that the credit therefore was given to him, the defendant was entitled to a verdict. It was, in fact, left to the jury to say whether *Harvey* was dealing with the defendant upon the footing of his former transactions, or whether he represented himself in this transaction as deal-

*Exch. of Pleas,*

1834.

BASTABLE  
v.  
POOLE

ing in another character. That question was correctly left for the jury to decide accordingly as they believed or disbelieved the testimony of *Harvey*. It was a question peculiarly for the jury, and they decided against the witness. With regard to the weight of evidence, the jury were justified in discrediting the account which *Harvey* gave of the transaction. The whole course of his former dealings with the defendant, in cases precisely similar to the present, was at variance with the statement he made. He admitted that, in the other instances in which he had discounted bills with the defendant, he and the defendant alone were the debtor and creditor in the account, and that the drawers of the bills had nothing to do with the defendant. He gave no reason to induce a belief that this transaction differed from the others in which he had been before engaged with the defendant; and, if the jury chose to believe the better evidence afforded by the whole course of his dealing with the defendant, in preference to the account he gave of this particular transaction, they were fully justified in so doing, and their verdict was not against, but in accordance with the evidence given. They believed it was a transaction, like the other transactions, only between the defendant and *Harvey*; that the former gave credit to the latter; and then, obeying the direction of the learned Baron, they found a verdict for the defendant.

The Court stopped *J. Jervis*, who was to have supported the rule.

**PARKE, B. (a)**—The Court are of opinion that in this case the rule for a new trial ought to be made absolute. This was an action brought by *Bastable* against *Poole* to recover part of the proceeds of a bill of exchange

(a) Lord Lyndhurst, C. B., was sitting in Equity.

discounted by *Poole*. The bill, which was the property of *Bastable*, was delivered by him to *Harvey* to get it discounted, and the latter indorsed it, and procured *Poole* to discount it; but *Poole*, without paying over the full amount, made use of the bill for his own purposes. The bill being returned at maturity to *Bastable*, and paid by him, he seeks in this action to recover the balance from *Poole*. It appears to me that the real question was, whether *Bastable*, at the time of this transaction, was the owner of the bill. If he was, then he is entitled to recover the balance of the proceeds received by *Poole*. I think that the representations of *Harvey* to *Poole* make no difference. Even supposing that, after the bill had been delivered to him for the purpose of procuring it to be discounted, *Harvey* had represented it to *Poole* as his bill, still *Bastable*, being in fact the owner of the bill, would be entitled to recover, unless the situation of *Poole* had been in some way altered by the representation. The only effect of the representation would be, not to deprive *Bastable* of his remedy, but to entitle *Poole*, as against him, to any defence which he would have had as against *Harvey*. If he had settled with *Harvey*, *Bastable* could not have sued; but if he has no defence against *Harvey*, he can have none against *Bastable*. This is the part of the summing up with which I am dissatisfied, and I think that there ought to be a new trial without costs. The question upon the new trial will be, whether or not *Bastable*, at the time of the bill being discounted by *Poole*, was the owner of the bill.

*Exch. of Pleas,*  
1834.

*BASTABLE*  
v.  
*POOLE.*

**BOLLAND, B.**—I agree with the rest of the Court that this case should be sent down to a new trial. It was an action which arose out of the discounting of a bill of exchange in the City of *London*. The witness *Harvey* told *Poole* that the bill was *Bastable's*, and that he had no interest in it. *Poole* had been in the previous habit of dis-

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counting bills for *Harvey*. Upon the latter calling upon *Poole* the next day, he refused to discount it, unless *Harvey* would indorse it. *Harvey* says that he told *Poole* it was *Bastable's* bill, but that if his indorsement would give any facility in circulating it, he would put his name upon it. I told the jury that if they believed that *Harvey* had put his name upon the bill for the purpose of affording a facility to *Poole*, and if *Poole* believed it to be *Bastable's* bill, *Bastable* was entitled to recover; but that, if *Harvey* said nothing of *Bastable*, and *Poole* did not know the bill to be his, *Harvey* could not, by throwing back the bill upon another person, give that other person a right of action against *Poole*. I also told the jury that *Harvey* appeared to be a witness who, by his demeanour and conduct, had, in my opinion, entitled himself to credit; but that, if they thought the bill had been discounted in such a way as rendered *Harvey* liable to *Poole*, they should find a verdict for the defendant.

**ALDERSON, B.**—I am of opinion that this rule ought to be made absolute without costs. It is admitted that, as the account stood between *Harvey* and *Poole*, there would have been no ground for a defence in an action brought by the former against the latter; and, if so, *Poole* had no defence against *Bastable*, the real owner of the bill. The evidence of the other transactions between *Harvey* and *Poole*, to which *Bastable* was no party, ought not to have affected the verdict of the jury.

**GURNEY, B.**—I am also of the same opinion. I think the verdict was against evidence. *Poole* had no defence either as against *Harvey* or as against *Bastable*. The only question was as to the property in the bill, and as that question was not left distinctly to the jury, there must be a new trial.

Rule absolute.

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RIDGWAY v. PHILIP and BROADHURST.

**ASSUMPSIT** upon an agreement by the defendants to build an engine according to their patent, called a Gas Vacuum Engine. The defendants pleaded separately, and by different attorneys, the general issue, and certain special pleas, upon which ultimately no question arose. At the trial before *Gaselee*, J., at the last Assizes for the county of *Cambridge*, the defence was, that the defendant *Broadhurst* was wrongly joined in the action. The following were the principal facts of the case:—The plaintiff being desirous of draining an extensive tract of land in *Cambridgeshire*, applied to a person named *Brown*, the patentee of a new invention called a Gas Vacuum Engine, to build one of those machines for his use. On the 27th *April*, 1830, the draft of an agreement was shewn by *Brown* to the plaintiff. The agreement purported to be between the plaintiff and "*Brown & Co.*", and on the plaintiff requiring to know what other persons than *Brown* composed that firm, *Brown* made on the back of the draft the following indorsement: "*John Broadhurst, Esq. and Dr. Wilson Philip.*" The contract being broken, the plaintiff resolved to commence proceedings for the breach, and, previously to the action being brought, his son called on the defendant *Broadhurst*, and, informing him of his father's intention, and of the indorsement made by *Brown* upon the draft of the agreement, begged to know if *Brown* had been correct in doing so. The defendant *Broadhurst* replied, that *Brown* was correct in doing so, and stated that he had bought his original interest from the other defendant Dr. *Philip*. In order further to fix *Broadhurst* as a partner, evidence was given, that, while the engine was in progress he attended very frequently at the manufactory to inquire how it was going on, and that he gave advice, and made suggestions, with regard to its construction. In answer to this evidence, an agreement or licence from *Brown* and the other

*A.*, the patentee of an engine, and *B.* were partners under the firm of *A. & Co.* *C.* purchased the licence of erecting such engines in *Cornwall*. *D.* contracted with *A. & Co.* to erect an engine in *Cambridgeshire*. *A.* informed *D.* that *B.* and *C.* were his partners, and *C.*, on being applied to, said it was correct. During the making of the engine, *C.* frequently came to inquire how the work went on. *D.* sued *B.* & *C.* for a breach of the contract, when *C.* proved his limited interest in the patent. The jury having found that *C.* was not a partner, the Court refused a new trial.

Where several defendants appear by different attorneys and counsel, the latter are entitled to cross-examine the witnesses, and address the jury separately.

*Exch. of Pleas,* parties interested in the patent, to *Broadhurst*, was given in evidence on the part of the latter, authorizing *Broadhurst* to use the patent for the erecting of engines *in certain parts of Cornwall only*, and it was contended that the admissions of *Broadhurst* were to be taken with reference to the interest which he thus possessed in the invention, and not to any participation either in the patent generally or in the particular transaction in question. The learned Judge left it to the jury to say whether *Broadhurst*, at the time he made the admission, was under a mistake, and whether the acts he was proved to have done did or did not afford a sufficient ground for supposing it to be a mistake; and, with regard to those acts, he left it to the jury to say whether they were referable to a partnership in the patent in general, or in this particular transaction, or whether they were done by *Broadhurst* to satisfy himself as to the licence he had obtained for erecting the same engines in *Cornwall*, being likely to be productive to him or not. The jury found a verdict for the defendants, on the ground that *Broadhurst* was not a partner.

*Kelly* now moved for a rule to shew cause why that verdict should not be set aside, and a new trial had, on the ground that the verdict was against the weight of evidence. The question turned solely upon the liability of *Broadhurst* as a partner, and the weight of evidence was in favour of a partnership. At the time of the making of the contract his name was written by *Brown* upon the back of the draft as one of the partners in that particular transaction, and subsequently he expressly recognizes the act of *Brown* in thus representing him as a partner, and says that it was correct. This declaration was strengthened by his conduct; for, during the whole course of the making of the engine, he was in the habit of attending and taking that interest in the progress of the work which a partner might be supposed to take. By this conduct he held himself out as a partner to all the world. The licence from the pro-

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prietors of the patent to use it in certain parts of *Cornwall* was no answer to this evidence, for it was perfectly consistent with such an interest that *Broadhurst* should also be interested as a partner in the erection of the engine in question.

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**PARKE, B. (a).**—It frequently happens in cases where the liability of persons as partners comes in question, that juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it; he is still at liberty, so far as regards his own interest, to contradict it by evidence. It was incumbent upon the plaintiff to shew something like a declaration by *Broadhurst* before the contract that he was a partner in the transaction. Whether the admission made by him, and his conduct during the erecting of the engine, were or were not referable to the limited interest which he possessed in the patent, was a question for the jury. It was not sufficient for the plaintiff to give in evidence acts which might be referred to such limited interest.

**Kelly.**—A question of practice remains to be decided. The defendants appeared by different attorneys and counsel, and the counsel were permitted to cross-examine the witnesses, and also to address the jury separately, a practice which has been held to be incorrect.

**PARKE, B.**—It has been so ruled at *Nisi Prius* (b), but it is not a practice calculated to further the ends of justice, and I think the proper course was pursued in the present case.

Rule refused.

(a) Lord Lyndhurst had left the Court during the argument.

*Perring v. Tucker*, M. & M. 391.

But see *R. v. Williamson*, 3 Stark.

(b) *Chippendale v. Masson*, 4 Campb. 174; *Doe v. Tindal*, M. & M. 314; 3 C. & P. 565 S. C;

162, where both counsel were allowed to address the jury. *Massey v. Goyder*, 4 C. & P. 162.

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1834.

COCKER v. COWPER.

A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water; and such licence may be revoked, though it has been acted upon.

In 1815, A. cut a drain in the land of B., to a spring, the water from which he appropriated as it ran through his own land. In 1833, B. stopped the drain:—*Held*, that B. was entitled so to do, no right having been acquired by user or length of possession.

THIS was an action on the case. The declaration stated, that the plaintiff was possessed of a brewery and premises, and that by reason thereof he was entitled to the benefit of certain water arising or flowing in or from a certain well or spring of water, in a certain close of the defendant, and which water ought to have run and flowed along a certain drain to the plaintiff's brewery, but that the defendant prevented the plaintiff from using the same. Plea not guilty. The cause came on to be tried at the last Assizes, for the county of Lancaster, before Gurney, B., when a verdict for the plaintiff was taken by consent, subject to the opinion of this Court upon a case to be stated by *Robert Brandt*, Esq., barrister at law. Mr. *Brandt*, accordingly, stated the following case:—“I do award and find, that, from the year 1799, up to and beyond the year 1815, the public-house, brewhouse, and premises, now held by the plaintiff, and mentioned in the declaration, were occupied by one *Paul Cowper*, under a lease thereof for 999 years, granted to him in 1799, by the then owner in fee, one *John Cowper*, the brother of the said *Paul Cowper*, and that the well of the plaintiff, also mentioned in the declaration, was made by the said *Paul Cowper*, long before the year 1815, and was originally supplied with water, conveyed from an underground spring by a covered drain, through the adjoining close of one *John Dunkerley*; and that, in the year 1815, the said *John Dunkerley* prevented the water from running any longer from his said close to the said well, in consequence whereof the said *Paul Cowper*, in order to obtain another supply of water from his said well, in the same year made a drain, and cut a deep funnel into and through a close (in the declaration mentioned as the close of the defendant), which was part of the estate of the above-mentioned *John Cowper*, and is now in the occupation of the defendant and her two daughters,

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*Betty Cowper* and *Sarah Cowper*. By those means, an underground spring was found in the said close, by which the well was supplied with water through the said drain and tunnel until *May* 1833. The said drain and tunnel were made by *Paul Cowper*, at an expense of about 15*l.*, with the verbal consent of *Benjamin Cowper*, who was the brother of *Paul Cowper*, and who was tenant of the said close from 1796 to 1830. The verbal consent of the defendant was also obtained at the time when the drain and tunnel were made. In the year 1815, the above-mentioned *John Cowper* was not living. He died, seised in fee of the said close, in 1809, intestate, leaving the defendant, his widow, and *Joshua*, his eldest son, his heir at law, and several other children surviving him. *Joshua* died intestate in *March*, 1814, at the age of thirteen years; *William*, the second son of *John*, was the heir of *Joshua*, and he also died intestate, in 1824, at the age of twenty years, being in the year 1815, when the drain and tunnel were made, of the age of eleven years. *Henry*, the third son of *John Cowper*, was the heir of the last-mentioned *William Cowper*, and he died intestate in 1827, at the age of nineteen years. On his death, the only surviving children of the said *John Cowper* were *Betty Cowper* and *Sarah Cowper*, who are still living. From the death of *John Cowper*, in 1809, until 1831, the defendant has ever lived with the children of such as survived, as the head of the family, but not on the estate of the said *John Cowper*, and has received the rents of that estate as the head of that family, from the death of *John Cowper*, until 1830; and in *May*, 1831, the defendant, and the said *Betty* and *Sarah*, went to reside on the said close. In *May*, 1833, the said *Betty Cowper* applied to Mr. *Lees*, the landlord of the plaintiff, for a remuneration for the supply of water issuing from the close above mentioned, and, on his refusal to make any, the said *Betty Cowper*, in the same month, ordered the drain and tunnel to be stopped up, so that the water

*Exch. of Pleas,* should not run down them, which was accordingly done,  
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 Cocker v. Cowper. with the knowledge and approval of the defendant. A guardian of the infant children of *John Cowper* was not appointed by any deed or testamentary disposition of *John Cowper*, nor in any other way unless by operation of law. The defendant, as the widow of *John Cowper*, was entitled to dower in her husband's estates, but dower has never been assigned to her. And (if under these circumstances the decision of the Court shall be in favour of the plaintiff), I do award, that the damages occasioned to him by the said defendant amount to the sum of 50*l.*"

*Alexander*, for the plaintiff.—The facts found by the arbitrator amount to a licence to the plaintiff to make the drain in question, and such licence having been acted upon could not be revoked. *Winter v. Brockwell* (a), *Tayler v. Waters* (b), *Liggins v. Inge* (c), *Mason v. Hill* (d). [Parke, B.—You cannot support this point without denying *Hewlins v. Shippam* to be law (e).] In *Winter v. Brockwell* it was held, that a licence of this kind, when executed, was not revocable. [Parke, B.—*Hewlins v. Shippam* does not interfere with *Winter v. Brockwell*. In the latter case, the licence was to put a skylight over the defendant's own area.] If the plaintiff cannot be considered as entitled by a licence to the enjoyment of the water, the facts found by the arbitrator shews a right in him, by reason of his having been the first person who found the spring, and who first appropriated it to a beneficial use. Such appropriation continued for the space of eighteen years, from 1815 to 1833. The person who first appropriates to his own use a stream of water, has a right to it against all others; and although the water arose in the close of the defendant, yet that circumstance could not prevent the plaintiff from first

(a) 8 East, 308.

(d) 5 B. & Adol. 1.

(b) 7 Taunt. 384, 2 Marsh 551.

(e) 5 B. & C. 221, 7 D. & R.

(c) 7 Bingh. 682.

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appropriating it, as it flowed through his own lands, or justify the defendant, after such appropriation, in diverting its course (*a*).

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*Wightman*, for the defendant, was stopped by the Court (*b*).

*Per Curiam*.—The plaintiff is clearly not entitled to recover. With regard to the question of licence, the case of *Hewlins v. Shippam* is decisive to shew that an easement like this cannot be conferred unless by deed, nor has the plaintiff acquired any other title to the water. In order to confer a title by possession, it ought to appear that he has enjoyed it for twenty years, but the original appropriation was only in the year 1815. The mere entry into the close of another, and cutting a drain there, and conveying water from a spring rising there, cannot confer a title; there must be

#### Judgment for the defendant.

(*a*) See what is said by Tindal, C. J., in *Liggins v. Inge*, 7 Bingh. 693; *Canham v. Fisk*, 2 C. & J. 126; *Mason v. Hill*, 5 B. & Adol. 15, (per Denman, C. J.); *Bealey v. Shaw*, 6 East, 208.

(*b*) The following are the points that were intended to be insisted on for the defendant:—First,

that a mere parol licence, though given by a competent person, is not sufficient to confer a permanent easement; secondly, that the licence was not given by a competent person; and thirdly, that the stoppage of the drain was not the act of the defendant.

*Exch. of Pleas,*  
1834.

PEATE v. DICKEN.

'Where an agreement refers to another document, so that the two papers, in fact, form only one agreement, it is sufficient if one of the papers only bear an agreement stamp.'

*Assumpsit on the following agreement :-*

"I undertake, on behalf of Mr. Peate, (in consideration of Mr. Dicken having this day given me an undertaking to procure Mr. Ward's cheque or note in favour of Mr. Peate for 150*l.*, on account of a debt due from Mr. Chambers to Mr. Peate), that Mr. Chambers shall have credit for that sum in his accounts with Mr. Peate, and that Mr. Ward shall stand in the place of Mr. Peate to that amount; and I further undertake, that Mr. Peate shall not personally dispute Mr. Ward's right to deduct that sum from the accounts owing by the

colliers of the Black Park Colliery to Mr. Chambers :—"Held, that this agreement shewed a sufficient consideration moving from the plaintiff.

An attorney, entering into an agreement on a *Sunday* for the settlement of his client's affairs, and thereby rendering himself personally liable, is not a person exercising his ordinary calling within the statute 29 Car. 2.

It is not necessary to conclude a plea, under the stat. 29 Car. 2, with a *contra formam statu.*

**ASSUMPSIT.**—The declaration stated, that whereas one *Robert Chambers*, before and at the time of the making of the promise and undertaking by the defendant after mentioned, was indebted to the plaintiff in a large sum of money, to wit, the sum of 200*l.*, and thereupon, to wit, in consideration that the plaintiff, at the special instance and request of the defendant, would undertake that the said *Robert Chambers* should have credit for the sum of 150*l.* in his accounts with the said plaintiff, and that one *Thomas Edward Ward* should stand in the place of the plaintiff to that amount, and that the plaintiff should not personally dispute the said *T. E. Ward's* right to deduct that sum from the amount owing by the colliers of the Black Park Colliery to the said *Robert Chambers*, the defendant undertook, that the said *T. E. Ward* would execute a promissory note to the plaintiff for the said sum of 150*l.* on account of the said debt due from the said *Robert Chambers* to the said plaintiff; and the plaintiff averred, that afterwards, to wit, on &c., he was ready and willing, and offered, that the said *Robert Chambers* should have credit for the sum of 150*l.* with him the plaintiff, and that the said *T. E. Ward* should stand in the place of him the plaintiff to that amount; and that he the plaintiff would not personally dispute the said *T. E. Ward's* right to deduct that sum from the accounts owing by the colliers of the Black Park Colliery to the said *Robert Chambers*; and then requested the said *T. E. Ward* to execute a promissory note to the plaintiff, then shewn and tendered to the said *T. E. Ward* for his signature, for the said sum of

150*l.*; of all which premises, the defendant, to wit, on &c., had notice. Breach, that the said *T. E. Ward* did not nor would, when he was so requested, or at any time whatsoever, execute a promissory note to the plaintiff for the said sum of 150*l.*, on account of the said debt so due from the said *Robert Chambers* to the said plaintiff, but wholly refused and neglected so to do; and so the plaintiff saith, that the defendant hath not performed his said promise and undertaking, but that the same hath been broken and not performed, to the plaintiff's damage of 300*l.* Pleas—first, the general issue; secondly, a special plea, alleging fraud, &c., (upon which no question arose); and thirdly, that, before and at the time of the making the promise and undertaking of the defendant in the declaration mentioned, he the defendant was and still is an attorney of the Court of our lord the now King, before the King himself; and the defendant further says, that, before and at the time of making the said promise and undertaking of the defendant, he had been and was retained and employed by the said *T. E. Ward* in his the defendant's ordinary calling of a legal agent, and, in the way of his business as such attorney, to negotiate with the plaintiff, on behalf of the said *T. E. Ward*, certain matters, to wit, the said matters in the second plea hereinbefore mentioned (save and except the fraudulent concealment therein mentioned); and the said defendant further says, that the said promise and undertaking in the declaration mentioned was made and entered into by the defendant on the Lord's-day, commonly called *Sunday*, to wit, on *Sunday*, the 16th day of *March*, 1834; and that the same was made and entered into by the defendant, as the attorney and legal agent of the said *T. E. Ward*, in the exercise of the wordly labour, business, or work of the ordinary calling of the defendant, as such attorney and agent, and that the same was not a work of necessity or charity; wherefore the defendant says, that the said promise and

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*Exch. of Pleas,* <sup>1834.</sup> undertaking in the said declaration mentioned was and is void in law; and this the defendant is ready to verify, &c. Demurrer to this plea, and joinder in demurrer.

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DICKEN.

The action was brought on the following undertaking by the defendant:—

"In consideration of Mr. *Hayward's* undertaking on behalf of Mr. *Edward Peate*, of *Measbury*, I undertake that Mr. *T. E. Ward* shall execute a promissory note to the said *Edward Peate* for the sum of 150*l.*, on account of a debt due from *Robert Chambers*, of *Chirk Bank*, to the said *Edward Peate*. Dated the 15th day of *March*, 1834.

"*George Dicken.*"

The cause came on to be tried upon the issues in fact, at the last Assizes for the county of *Salop*, before *Alderson*, B., when the plaintiff produced the above undertaking, properly stamped, and then offered in evidence the undertaking of Mr. *Hayward*, referred to in the defendant's undertaking. Mr. *Hayward's* undertaking was as follows:—

"I undertake, on behalf of Mr. *Peate*, (in consideration of Mr. *Dicken* having this day given me an undertaking to procure Mr. *Ward's* check or note in favour of Mr. *Peate* for 150*l.* on account of a debt due from Mr. *Chambers* to Mr. *Peate*, that Mr. *Chambers* shall have credit for that sum in his accounts with Mr. *Peate*, and that Mr. *Ward* shall stand in the place of Mr. *Peate* to that amount; and I further undertake that Mr. *Peate* shall not personally dispute Mr. *Ward's* right to deduct that sum from the accounts owing by the colliers of the Black Park Colliery to Mr. *Chambers*.

*John Hayward.*

*Oswestry, 15th March, 1834.*

Upon the production of this instrument, it was objected that it ought not to be received in evidence, as it bore no stamp. The learned Baron, however, overruled the objection, and the jury found a verdict for the plaintiff upon the general issue.

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*v.*  
DICKEN.

*Justice* now moved for a rule to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had. The instruments are separate and distinct, not forming, as in the case of a series of letters, one agreement in the whole. Each, therefore, required a separate stamp. *Hayward's* agreement formed no part of *Dicken's*, though referred to in the latter; and suppose *Dickens* had brought an action against *Hayward*, his part must have been stamped. He cited *Doe v. Hore* (*a*), *Waddington v. Francis* (*b*), *Robson v. Hall* (*c*).

The Court, having taken time to consider whether they would grant a rule, their determination was now delivered by

Lord LYNDHURST, C. B.—In this case two distinct papers, the one referring to the other, were put in evidence, and there was only one agreement stamp impressed upon one of them. It was objected that the unstamped paper was improperly admitted in evidence; but we are of opinion that it was rightly received. The two documents, in fact, formed only one agreement; and we think that the case falls within the same rule as that of several letters evidencing one agreement; in which case it is provided by the Stamp Act (*d*), that where divers letters shall be offered in evidence to prove any agreement between the

(*a*) 2 Esp. 724.

(*b*) 5 Esp. 182.

(*c*) Peake, N. P. C. 128.

(*d*) 55 G. 3, c. 184, sched.

*Exch. of Pleas,* parties who shall have written such letters, it shall be  
 1834. sufficient if any one of such letters shall be stamped with a  
 PEATE duty of 1*£* 15*s.*

v.  
DICKEN.

Rule refused.

ON a subsequent day in this term the demurrer to the last plea came on for argument.

*R. V. Richards*, in support of the demurrer.—There are three objections to the plea: *first*, that it does not conclude *contra formam statuti*; *secondly*, that it does not shew that the plaintiff had notice that the agreement between the defendant and *Ward* was made on a *Sunday*; and, *thirdly*, that an attorney is not a person included within the statute 29 Car. 2, c. 7(a). The plea ought to have concluded *contra formam statuti*. If this had been a proceeding for penalties, there is no doubt that such a conclusion would have been necessary. *Wells v. Iggulden* (b), *Lee v. Clarke* (c), *Earl Clanricarde v. Stokes* (d), *Rex v. Southerton* (e). [Parke, B.—How can it be said to be part of the ordinary business of an attorney or agent to make himself personally liable on behalf of his client? Lord *Lyndhurst*, C. B.—If a man signs a promissory note on the Lord's-day, as a security for another, is that a part of his ordinary business?]

(a) By which it is enacted, that "all and every person and persons whatsoever shall, on every Lord's-day, apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do

or exercise any worldly labour, business or work of their ordinary callings upon the Lord's-day, or any part thereof, works of necessity and charity only excepted."

(b) 3 B. & C. 186.

(c) 2 East, 333.

(d) 7 East, 516.

(e) 6 East, 126.

The Court then called upon *Justice* to support the plea.

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1834.*

*Justice*.—It may be admitted that in penal actions, and in cases where the act is sought to be enforced against a party for the purpose of recovering a penalty, it is necessary to insert *contra formam statuti*; but there is no authority to be found for the position that such an allegation is necessary in a plea. There are many cases in which the provisions of statutes imposing penalties are relied upon as a defence, and in none of those instances do the pleas conclude *contra formam statuti*, as in the plea of usury. [The Court intimated to *Justice* that he need not trouble himself further on this point.]

The next objection is, that the last plea does not contain any averment that the plaintiff had notice of the agreement having been entered into on a *Sunday*. [This question ultimately became immaterial, and the Court gave no opinion upon it.]

The remaining question upon the validity of the plea is, whether or not the attorney was acting in his ordinary calling when he entered into the agreement (a). For preventing the evils which it is intended to remedy, the statute of *Charles 2* ought to receive a liberal interpretation,

(a) The following are the later decisions upon this clause of the statute of Car. 2. The sale of a horse on a Sunday, not by a horse dealer, is not within the statute; *Drury v. Defontaine*, 1 Taunt. 131; but it is otherwise where the sale is by a horse dealer. *Fennell v. Ridder*, 5 B. & C. 406; 8 D. & R. 204, S. C. But where A., not knowing that B. was a horse dealer, made a verbal bargain with him on a Sunday for the purchase of a horse, the price (which was above 10*l.*) being then specified, and the horse

warranted sound; but it was not delivered till the following Tuesday, when the money was paid; it was held that the contract was not complete until the delivery of the horse, and that therefore it was not void under this act; but assuming it to be void, as the purchaser was ignorant that the vendor was exercising his ordinary calling on the *Sunday*, he had not been guilty of any breach of the law, and was therefore entitled to recover back the price of the horse for breach of the warranty. *Blossome v. Wil-*

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*Exch. of Pleas,* as was said by the Court of *Common Pleas* in the case of *Smith v. Sparrow* (a), and all the late decisions have proceeded upon the same principle. In order to shew that the attorney was acting in his ordinary calling as such, it is necessary to look at the second plea, to which the last plea expressly refers; and from the second plea it appears that the transaction out of which this agreement arose was precisely that which falls within the ordinary calling of an attorney. The attorneys of the two parties met together, and, for the purpose of settling the affairs of their clients, which in the course of their business it was their duty to do, they entered into an agreement, by which one of them (the defendant) rendered himself personally liable. [Lord *Lyndhurst*, B.—Has it ever been held that an attorney is within the statute of *Charles 2*?] There is no decision on the point. [*Alderson*, B.—The words of the statute are, that no “tradesman, artificer, workman, labourer, or other person whatsoever,” shall exercise their ordinary callings. Can it be contended that an attorney is a tradesman?] An attorney may be included under the words “other person.” [*Alderson*, B.—Those words mean other persons *eiusdem generis*. *Parke*, B.—It was so decided in *Sandiman v. Breach* (b).] The calling of an attorney certainly comes within the spirit of the act. [*Parke*, B.—The spirit of the act can only be collected through the ordinary rules of construction.] The case of *Smith v. Sparrow* has much expanded the former

*liams*, 3 B. & C. 232, 5 D. & R. 82, S. C. A contract made between a farmer and a labourer for hiring is not within the statute. *R. v. Whitnash*, 7 B. & C. 596, 1 M. & R. 452, S. C. So, a stage coachman driving a stage coach. *Sandiman v. Breach*, 7 B. & C. 96, 1 M. & R. 457, n., S. C. As to what acts, in general, are void, when done on

a Sunday, see Evans's note to *Wilson v. Tucker*, 1 Salk. 78, 6th ed., and 2 Chitty's Coll. Stat. 1039, n.

(a) 4 Bingh. 84, 2 C. & P. 544, S. C.

(b) 7 B. & C. 100, and 1 M. & R. 452, S. C.; and see also what is said by Bayley, J., and Holroyd, J., in *Rex v. Whitnash*, Id. 600, 601.

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rule of construction adopted with regard to this act. [Alderson, B.—You go very far when you argue that it is in the ordinary course of an attorney's calling to pay his client's debts out of his own pocket. Lord Lyndhurst, C. B.—The plea cannot be sustained. The engagement into which the defendant entered is clearly something *ultra* his ordinary calling, even supposing that, as an attorney, he came within the statute.] The defendant then is driven back upon his objections to the declaration, and he contends that there is no consideration shewn, entitling the plaintiff to maintain the action, no detriment to the plaintiff, and nob<sup>e</sup> benefit to the defendant. *Chambers* was indebted to the plaintiff in the sum of 200*l.*, and the consideration as alleged was this, that, in consideration that the plaintiff would undertake that *Chambers* should have credit with *Ward* for the sum of 150*l.* in his account with the plaintiff, and that *Ward* should stand in the place of the plaintiff to that amount, and that the plaintiff should not personally dispute *Ward*'s right to deduct that sum of 150*l.* from the accounts owing by the colliers of the Black Park Colliery to *Chambers*, then the defendant undertook that *Ward* should execute a promissory note to the plaintiff for 150*l.* on account of the said debt due from *Chambers* to the plaintiff. There is then an averment of being ready and willing, &c. The declaration, therefore, shews an agreement by the plaintiff for the transfer of *Chambers*'s debt to *Ward*, without any allegation of the consent of either of those parties. Without such consent, supposing *Chambers* had such credit (which is not alleged), *Chambers* could not be made a debtor to *Ward*, nor could the latter be made his creditor; but the situation and legal liabilities of all the parties remained precisely the same. *Ward* could not have sued *Chambers*, and *Chambers* would still have been liable to the plaintiff. The agreement says, that *Ward* is to stand in the plaintiff's place. If this means that the plaintiff assigns the debt due from *Chambers* to himself to *Ward*, it is

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the assignment of a chose in action, and has no operation. It should have been shewn on the face of the declaration that it was a legal assignment. The transfer of a debt is only valid when all the parties consent to the arrangement, as in *Wilson v. Coupland* (*a*). It would then have appeared, that *Chambers's* debt to the plaintiff was extinguished to the extent of 150*l.*; but, according to the statement in the declaration, that debt is still subsisting. Where *A.* sues *B.*, and *B.* sues *C.*, the extinguishment of *B.'s* debt to *A.* may be a good consideration for the transfer of *C.'s* debt to *A.*; but here, though *Chambers* is indebted to the plaintiff, yet the plaintiff is not indebted to *Ward*, and therefore he has no power to invest *Ward* with a right to sue *Chambers* in his place, and to make *Chambers Ward's* debtor. [Lord *Lyndhurst*, C. B.—The plaintiff undertakes to give up his claim upon *Chambers*—is not that a detriment to the plaintiff, and is it not a good consideration?] Not without the consent of *Ward* and *Chambers*, without which the parties remain precisely where they were, and the agreement is *nudum pactum*. The plaintiff might still have sued *Chambers*. [Parke, B.—It would have been a breach of his engagement if he had so done.] That would have been no answer in the mouth of *Chambers*. *Wharton v. Walker* (*b*) shews that there ought to be an extinguishment of the intermediate debt. [Parke, B.—In that case there was no privity, it was nothing more than an order upon the tenant, who did not, as it may be said, attorn.] The plaintiff ought also to have shewn by averment that he had carried the stipulations of the agreement into effect. [Parke, B.—The declaration alleges that the defendant promised in consideration of the plaintiff undertaking, &c.; they are mutual promises, and the declaration is therefore sufficient.]

Lord LYNDHURST, C. B.—The effect of the plaintiff's

(*a*) 5 B. & Ald. 228.

(*b*) 4 B. & C. 163.

engagement, stripped of all useless words, is this:—The plaintiff stipulates with the defendant, that he will give *Chambers* credit for 150*l.*, in consideration of the defendant stipulating that *Ward* shall give the plaintiff a promissory note; the plaintiff also stipulates that *Ward* shall stand in his place. This is an undertaking by the plaintiff to do every thing that is necessary to carry those stipulations into effect; and it therefore furnishes a good consideration for the defendant's promise. The giving up of the 150*l.* of the debt due from *Chambers* to himself, is a detriment to the plaintiff; and although, as it has been argued, he might have sued *Chambers* before the consent of all the parties had been obtained to the transfer, yet, if he had done so, he would have made himself liable on the agreement.

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PARKE, B.—I am of the same opinion. The undertaking of the plaintiff is to discharge *Chambers* from a portion of the debt due to himself, and to permit *Ward* to stand in his place as to that portion. There is nothing to prevent him from making such an engagement, and he is bound by it to do every thing necessary on his part to its execution. It is very true that *Chambers's* liability could not be altered without his consent; but this does not affect the undertaking of the plaintiff to do all that is in his power to effect the transfer. It is a binding engagement upon the plaintiff, and therefore a sufficient consideration to sustain the promise of the defendant. The declaration is good, and the plea demurred to is bad.

The other Barons expressed the same opinion, and there was—

Judgment for the plaintiff.

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GEORGE INGLIS and JOHN FREDERICK WITTENBURY, Assignees of THOMAS JAMES SPENCE, v. GEORGE SPENCE.

In an action by assignees of a bankrupt, admissions of their title as assignees by the defendant in letters addressed to the solicitor to the commission and to one of the assignees, are *prima facie* evidence of title, so as to dispense with strict proof, though there is a plea denying the title of the plaintiffs as assignees, and notice to dispute has been given.

**ASSUMPSIT** for goods sold and delivered by the bankrupt before his bankruptcy. Plea, that the plaintiffs are not assignees of the estate and effects of the said *T. J. Spence*, and that the said *T. J. Spence* is not a bankrupt, and notice to dispute the trading, &c. The cause was tried before *Gurney, B.*, at the last Assizes for the county of *Lancaster*, when, for the purpose of proving the title of the plaintiffs as assignees, two letters written by the defendant were given in evidence. The first of these letters was addressed to the solicitors to the commission, and was in these words:—

“Manchester, 7 March, 1834.

“Messrs. *Hadfield & Grave.*”

“Gentlemen,—I have received your letter of the 4th instant, the contents of which surprise me a good deal, for from the conversation I had with Mr. *Whittenbury* and Mr. *Inglis* in Mr. *Stanway's* office, it was fully understood from what I then stated, that that debt was not to be called for until I was enabled to make some arrangement for payment. I have seen Mr. *Whittenbury* to-day, and he says he has never heard it spoken about since that time. I am beginning a new business, which will take a time to do any good with. I am also waiting in weekly expectation of my old concern being brought to a close, having long had the recommendation of the trustee and commissioners to my discharge, but, until this is accomplished, I cannot enter into any new arrangement; and if your instructions from the assignee are to take steps against me, you must do it. That debt was more in amount before I left *Dumfermline* than it is now, and would have

been nearly liquidated by this time had I been in employment. As formerly stated, I will take the debt upon me, but I will not engage that the interest shall accumulate; and if the assignees of *T. J. Spence's* estate do not feel inclined to give me that promise, I must apply to another to take a step that will relieve me of it; for I cannot pretend to go on in business, and even attempt the principal, if I am to be harassed in this way. I will require an early reply to this letter for my guidance in business, which, if persevered in, will take me a good deal from home. I see a letter to my son *A. G. Spence*; he is in *Liverpool*; his account has all along been reckoned as finally bad, and any step against him will only add expense, make him lose his situation, and be at the expense of the Insolvent Act. I have not forwarded his letter to save postage, as I know what I have stated is all that he can say upon the subject.

"I am, &c.

"George Spence."

The other letter, addressed to one of the plaintiffs, contained the following passages with reference to the demand made upon the defendant by them:—

"I have stated my willingness to pay the claim as soon as I could realize any funds to do so with; but if you persist in prosecuting me now I will be compelled to take the benefit of the Insolvent Debtors' Act, having no other alternative left, and thus you will squander part of the funds in a fruitless law-suit, and blast the prospects I have entertained from the business I am endeavouring to establish, with a view to enable me to supply my family and liquidate my debts. What I have now stated are facts, so that, should you proceed farther in your action, in the end you cannot say you have done so in ignorance. . . . I submit to you the propriety of fulfilling that part of the duty of assignees to protect alike both parties; and, in

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conclusion, I have only once more to state, that prosecuting me at present must diminish the funds of my son's estate, and thus injure his creditors; and is also a species of oppression to him as well as the rest of my family and myself."

It was objected for the defendant that these admissions did not supersede the necessity of proving the requisites of the bankruptcy in the usual way; but the learned Judge being of opinion that the evidence was sufficient, a verdict was found for the plaintiffs.

*Acherley*, Serjt., now moved for a rule to shew cause why the verdict for the plaintiffs should not be set aside and a new trial had. The letters of the defendant were not sufficient evidence of the plaintiffs' title as assignees. That title is distinctly put in issue on the record, and the plaintiffs were bound to prove it in the regular manner. There is no case in which it has been held, that, where the title is traversed and notice given, an admission like this is sufficient. The case of *Dickinson v. Coward* (*a*) was cited for the plaintiffs at the trial; but from that authority it appears to have been the opinion of Lord *Tenterden* (then Mr. Justice *Abbott*), that an admission in a case like the present would not be sufficient evidence of title. He says, "If the defendant, however, had doubted whether he (the plaintiff) bore that character (of assignee), it was competent to him to put that fact in issue, by giving the requisite notice; and not having done so, it must be taken as against him that he made the payment to and treated with the plaintiff in the character in which he has sued, *viz.* as assignee of *Booth*." The only other

(*a*) 1 B. & Ald. 677. See also *Barnes*, 1 Stark. N. P. C. 243; *Ledbetter v. Salt*, 4 Bing. 623, 1 *Clarke v. Clarke*, 6 Esp. 61; *Like Moore & P.* 597, S. C.; *Rex v. Howe*, 6 Esp. 20.

case cited was that of *Pope v. Monk* (*a*), in which it does not appear that there was any notice to dispute given. In *Rankin v. Horner* (*b*), however, which was an action of trover by the assignees of a bankrupt against the sheriff and execution creditor, notice having been given under the 49 Geo. 3, c. 121, it was held that proof that the execution creditor had proved his debt under the commission was not evidence of the petitioning creditor's debt, either against the sheriff or against the execution creditor himself. The reasoning of Lord *Ellenborough* in that case is strictly applicable here. He says, "The creditors have not the means of knowing what was the evidence upon which the party was declared a bankrupt; they had no right to be present when that evidence was given; they have no right to look at the proceedings under the commission, in order to see what that evidence was; and is it reasonable that they should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed, whether such acts existed or not, and of having such their supposed admission received as evidence against them in every case in which the question would arise?" If it should be held that evidence of this nature is sufficient, the result would be, that a creditor finding a person acting in the character of assignee, and, in ignorance of his title, making use of expressions that might be held to recognise it, would have no means afterwards of disputing that title. It is said, that the admission is only *prima facie* evidence, and may be rebutted; but as to the creditor it is conclusive. How is he to rebut it? What knowledge has he of the title of the assignees—what means of acquiring a knowledge of it? The burthen of proof lies upon the assignees themselves, who are cognizant of their own title, and who have had notice by the plea put upon the record

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(*a*) 2 C. & P. 112.

(*b*) 16 East, 191.

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that they will be required to prove it in the regular manner.

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**Lord LYNDHURST, C. B.**—The admissions contained in the letters of the defendant were sufficient *prima facie* evidence of the plaintiffs' title as assignees (*a*). What is said by Lord *Ellenborough* on the subject in *Dickinson v. Coward* is decisive:—"It certainly is not conclusive evidence, and it was competent to the defendant to shew that the plaintiff bore any other character; but I take it to be quite clear, that any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that that relation exists." Suppose that the defendant had in express words admitted the title of the plaintiffs as assignees, can it be said that evidence of such an admission could not be received? The jury have decided that the letters of the defendant were an admission of the character in which the plaintiffs make their demand, and after that finding, it cannot be contended that the words do not amount to such an admission. With respect to the alleged hardship of the case, parties must be careful to regard the consequences when they make admissions.

**PARKE, B.**—If the defendant before action brought had distinctly admitted all the facts requisite to form the plaintiffs' title, evidence of such an admission could not have been rejected. The jury in this case have found that the

(*a*) In *Goldie v. Gunston*, 4 Campb. 381, Lord Ellenborough treated an application to the commissioners by a bankrupt, for procuring his discharge, as conclusive evidence against him of their title, in an action brought to dispute the commission; and the same point was decided in *Watson*

v. *Wace*, 5 B. & C. 153; 7 D. & R. 633, 2 C. & P. 171, S. C. See *Mott v. Mills*, 3 C. & P. 197. The only remedy is to apply to the Chancellor for a supersedeas. As to the effect of particular acts, as admissions or estoppels by a bankrupt, see *Heane v. Rogers*, 9 B. & C. 575; 4 Man. & Ry. 486.

expressions amounted to such an admission. With regard to the pleadings, there is no difference whether the question arises upon the general issue, as formerly, or upon a special traverse of the plaintiffs' title, as in the present case; nor does the notice make any distinction with respect to the nature of the evidence, and the mode of proof. The issue may be supported as well by evidence of admissions as by other proof. If it be contended, that the words of the defendant did not amount to an admission, or that the admission was made for the purpose of purchasing peace, or the like, those are questions which ought to have been left to the jury.

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**ALDERSON, B.**—I am of the same opinion. What is said by Lord *Ellenborough* in *Rankin v. Horner* is referable to the inference which a jury ought to draw from such admissions.

**GURNEY, B., concurred.**

Rule refused.



#### HOOPER v. WALLER.

**T**HE defendant was arrested for 75*l.*, and upon the copy of the process delivered to him after the arrest there was the following indorsement:—"The plaintiff claims 75*l.* 10*s.* for debt, and 4*l.* 4*s.* for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the *arrest hereon*, further proceedings will be stayed." The defendant gave bail to the sheriff, and

Where upon the arrest of a defendant, the copy of the process delivered to him was indorsed:—"The plaintiff claims 75*l.* 10*s.* for debt; and 4*l.* 4*s.* for costs; and if the amount thereof be paid to the plaintiff, or his attorney, within four days from the

**John Jervis** moved for a rule to shew cause why the bail-bond should not be delivered up to be cancelled, upon *arrest hereon*, proceedings will be stayed:—"Held, to be irregular under R. II., H. T. 2 W. 4.

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entering a common appearance for the defendant. He founded his motion upon the form of the indorsement, which he contended was irregular, inasmuch as it varied from the form prescribed in R. II., H. T. 2 W. 4, the words "arrest hereon" being substituted for the words "service hereof."

The Court expressed a wish to consult the other Judges, in order that the practice might be uniform in all the Courts; and now—

PARKE, B. said:—We have spoken to the Judges upon this point, and are of opinion that the indorsement is irregular. The plaintiff might, however, take out a summons to amend the indorsement, and, upon the discussion of the rule to set aside the proceedings, might shew the amendment as cause, and the Court would then discharge the rule upon payment of the costs occasioned by the irregularity. As this is the first case upon the subject, if the plaintiff will amend and pay the costs incurred up to this time, it will be a saving of expense not to draw up the rule; but if he will not comply with these terms, then the rule may be drawn up to cancel the bail-bond for irregularity, with costs. Where the indorsement is amended, the defendant will be allowed four days from the time of the amendment to pay the money.

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#### JACKSON v. JACKSON.

Where a *capias* was directed to the "sheriffs" of *Middlesex*, instead of "sheriff":—*Held, an irregularity.*

THE defendant was arrested upon a *capias*, directed to the sheriffs of *Middlesex*, upon which ground *John Jervis* moved to set aside the process for irregularity.

*Butt* shewed cause, and cited *Clutterbuck v. Wiseman* (a).

(a) 2 Cr. & J. 213. The writ in *Clutterbuck v. Wiseman* was a *quo minus*, before the statute.

*Jervis*, contrà, relied on *Barker v. Weedon* (*a*), *Nicol v. Exch. of Pleas*,  
*Boyne* (*b*), and *Storr v. Mount* (*c*). 1834.

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**PARKE, B.**—We have held, that this being a writ given by the statute, the statutory form must be pursued, and we must abide by the recent decisions.

### **Rule absolute.**

- (a) *Ante*, p. 396. (b) 2 Dowl. P. C. 417.  
(c) 2 Dowl. P. C. 417.

**JOHN PENNY, surviving Partner of ROBERT BROOKES,  
v. JOHN ROSE INNES.**

**ASSUMPSIT** on a bill of exchange.—The first count stated, that one *William Wilson* made his bill of exchange, and thereby requested *Henry Wilson & Co.*, twelve months after date, to pay to his (*W. W.'s*) order, the sum of 200*l.* It then stated an indorsement by *W. W.* to the defendant, and an indorsement by the defendant to the plaintiff and *Robert Brookes*. The second count stated the making of the bill as in the first count, and an indorsement by the defendant to the plaintiff and *Brookes*, (omitting the statement of the indorsement by *W. W.*) The third count stated, that the defendant drew the bill upon the same drawees, payable to his own order, and that he indorsed it to the plaintiff and *Brookes*. The fourth count stated, that the defendant drew the bill upon the same drawees, payable to the order of *W. W.*, and that *W. W.* indorsed it to the plaintiff and *Brookes*. The fifth count stated, that *W. W.* drew the bill upon the same drawees, payable to his own order, and indorsed it to the plaintiff and *Brookes*, who delivered the bill to the defendant, who then and there indorsed and delivered the same to the plaintiff and

*Exch. of Pleas, Brookes.* The declaration also contained a count for goods sold and delivered, and the usual money counts. Plea—the general issue. On the trial before *Parke*, B., at the *London* Sittings after last *Trinity* Term, the bill upon which the action was brought appeared to be in the following form:—

" £200. 0s. Od. 9th Sept. 1829.  
" Twelve months after date, pay to me, or my order,  
the sum of two hundred pounds, for value received.  
William Wilson.  
" Messrs. Henry Wilson & Co.  
Pedlar's Acre, Lambeth."

(Indorsed,) "Pay Messrs. *Brookes & Penny*, or order. *Wm. Wilson.*" "John Rose Innes," "*Brookes & Penny.*"

It appeared in evidence, that the defendant had indorsed his name upon the bill after the special indorsement by *William Wilson*, the payee, to the plaintiff and *Brookes*, and before the indorsement by the latter, and it was objected that this indorsement gave no title to the plaintiff and *Brookes* to sue the defendant on the bill; but the learned Baron thought that the indorsement amounted to a fresh drawing, and the plaintiff had a verdict. No question arose with regard to the consideration for the defendant's indorsement.

*Platt* now moved for a rule to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, or a new trial had. The question is, whether the defendant, by putting his name on the back of the bill immediately after the special indorsement, and before the

indorsement by the special indorsees, rendered himself liable as a new drawer; and if so, whether the bill did not require a fresh stamp. The defendant conveyed no interest in the bill by his indorsement. Had it been indorsed by the plaintiff and *Brookes* to the defendant, and by him indorsed again to the plaintiff and *Brookes*, they could not have sued the defendant as indorsee, because he in his turn might have sued them in the same character. In what capacity is the defendant liable upon the bill? He is a mere stranger to it, and has neither property nor the power of transferring the property in it. He puts his name upon it. That act confers no title upon any one, and imposes no liability upon the defendant.

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**Lord LYNDHURST, C. B.**—The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to *Brookes & Penny* to strike out their own indorsement, and then the bill would have stood as a bill indorsed by the defendant in blank. This would not have prejudiced any other party. The bill was their property, and the indorsement, whether general or special, might be struck out.

**PARKE, B.**—Every indorser of a bill is a new drawer; and it is part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him (*a*). Still it remains the same instrument as before, and does not require a fresh stamp, for it is not a fresh instrument. It is urged that the defendant when he indorsed the bill had no property in it; but that is not necessary in order to render him liable to be sued upon the bill. Suppose that a

(*a*) See *Buller v. Crips*, 6 Mod. *Ballingall v. Gloster*, 3 East, 482; 30; *Hill v. Lewis*, 1 Salk. 132; *Gibson v. Minet*, 1 H. Bl. 587. *Heylyn v. Adamson*, 2 Burr. 674;

*Exch. of Pleas,* man steals a bill and indorses it for value, might it not in pleading be stated that he drew the bill? The indorsement by the defendant was equivalent to the drawing of a new bill, and was intended to transfer that new bill to the plaintiff and *Brookes*. It has been argued that the case may be treated as if the defendant was the indorsee of the plaintiff and *Brookes*, and as if he had again delivered the bill to them; and it is said that in such a case, to avoid circuity of action, the plaintiff ought not to be suffered to recover. But the fact was not so. The defendant never was the indorsee of the plaintiff and *Brookes*, nor was it ever intended to convey the property in the bill to him.

**ALDERSON, B.**—The indorsement only operates as against the party making it, and then as a fresh drawing. It has no operation with regard to the other parties to the bill.

**GURNEY, B.**—I am of the same opinion.

Rule refused (a).

(a) In the American edition of Bayley on Bills, p. 94, (Boston, 1826), is the following note of a case which appears to be at variance with the above decision:—“Where A., being in possession of a note to which he was not a party, and which had not been indorsed by the payee, indorsed it to B.

for a valuable consideration, it was held that B. could maintain no action against A. without proof of some special contract between A. and B. *Birchard v. Bartlett*, 14 Mass. R. 279.” But see the cases cited in the American edition of Chitty on Bills, p. 109, n. (Philadelphia, 1826).

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JOHN THOMAS CARR, THOMAS BROWN, and EDWARD HALL CAMPBELL, Assignees of ANTHONY CLAPHAM, a Bankrupt, *v.* GEORGE BURDISS and GEORGE BRUMELL.

**T**ROVER for goods, chattels, and fixtures. Pleas—First, that *A. Clapham* was not nor is a bankrupt according to the true intent and meaning of the statute concerning bankrupts, in manner, &c.; second plea, denying the possession of the plaintiffs; third plea, denying the possession of the bankrupt; fourth plea, a deed of assignment by *A. Clapham*, of the goods, chattels, and fixtures to the defendants, under which they took possession before the bankruptcy. Replication, taking issue upon the first, second, and third pleas; to the fourth plea, that the defendants did not take possession of the goods, &c. before the said *A. Clapham* became a bankrupt; upon which issue was joined. The cause came on for trial before *Gurney, B.*, at the last Assizes for the town and county of *Newcastle-upon-Tyne*, when the following appeared to be the facts of the case:—

*Anthony Clapham*, before his bankruptcy, carried on an extensive business at *Newcastle*, as a soap and alkali manufacturer. The defendants were directors and trustees of the North of *England* Joint Stock Banking Company, established at *Newcastle* in the month of *December, 1832*, under the provisions of the *7 Geo. 4, c. 46*. *Anthony Clapham* was himself one of the directors and trustees, and, upon the opening of the bank, removed his banking account thither. The bank made extensive advances to him; and, on the 8th *July 1833*, the balance against him in the books of the bank was *13,147l. 5s. 8d.* In consequence of the account being thus overdrawn, the directors applied to him for security. A deed of assignment was accordingly pre-

*A.*, a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure past and future advances, his leasehold property, with all the stock in trade, utensils, and effects thereon, and also a policy of insurance, as a security for monies advanced or to be advanced. The deed contained a power of sale, and a proviso that the trader should remain in possession until default. The assignment did not include another part of *A.'s* property equal in amount to the debt covered by the security. In an action by *A.'s* assignees, to recover part of the property assigned, the Jury found that the deed was not executed in contemplation of bankruptcy: —*Held*, that it was a valid deed, and did not amount to an act of bankruptcy.

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pared and executed, bearing date the day last mentioned. It was made between *A. Clapham*, of the first part, *Jonathan Backhouse* and others of the second part, and the defendants of the third part; and after reciting the title to certain leasehold property of *A. Clapham*, and the incumbrances thereon, and also an insurance upon his life for 1000*l.*, proceeded as follows:—"And whereas the said *A. Clapham* has, in his own name alone, and in the name of *A. Clapham & Co.*, for some time dealt with the said North of *England* Joint Stock Banking Company, and, in order to induce them to continue their dealings with him, hath agreed to secure, in manner hereinafter expressed, as well such sum and sums of money as shall for the time being, and at any time or times hereafter, be due from him, on the balance of his account with the said North of *England* Joint Stock Banking Company, of whatsoever persons the same shall for the time being be constituted; as also such sum and sums of money as he the said *A. Clapham* shall for the time being, and at any time or times hereafter, be indebted in or liable to pay to such banking company, upon or in respect of any bill of exchange, &c., and whether the same shall be actually due or not, together with interest at the rate of &c." The parties to the deed of the second part (the prior mortgagees of the premises), then conveyed the leasehold premises to the defendants, their executors, administrators, and assigns, in trust for the Joint Stock Banking Company, subject to a proviso for redemption on payment of the sums of money after mentioned. The parties to the deed of the second part, and *A. Clapham*, then bargained, sold, assigned, &c. to the defendants, their executors, administrators and assigns, "all and singular the engines, machines, vats, coppers, boilers, and other articles and things, and stock in trade and effects, belonging to the said *A. Clapham*, and in, upon, and about the said leasehold premises hereinbefore mentioned, and intended to be hereby

assigned, or any part thereof." The policy of insurance was then assigned in the same manner. The deed contained a power of attorney to the defendants to receive monies due upon the policy, and a covenant on the part of *A. Clapham* to pay to the trustees of the Joint Stock Banking Company, on request, all such sums of money as he should be indebted to them in, whether the same should be actually due or not. The deed likewise contained a power of sale to the defendants, authorizing them to sell the leasehold premises and policy of insurance, and the other premises thereby assigned. And it was provided that, until default should happen to be made in payment of the monies thereby agreed to be secured, it should be lawful for *A. Clapham*, his executors, &c., to possess and enjoy the hereditaments and premises thereby assigned, and to receive and take the rents, issues, and profits thereof, for his own use and benefit, without the lawfuleviction or denial of the covenantors, their *cestuis que trust*, executors, &c. The deed then recited the deposit with the defendants of the lease of a soapery, and assigned to them all the machines, vats, &c. &c., and stock in trade and effects, belonging to the said *A. Clapham*, upon or about the last-mentioned premises.

In addition to his trade of a soap-boiler and alkali maker, *A. Clapham* was also a considerable ship-owner, and, at the time of the execution of the deed above mentioned, he possessed three ships of large value, which, in the month of *December* in the same year, he transferred to the Joint Stock Banking Company to cover a further advance of 13,000*l.* On the 8th of *January*, 1834, *A. Clapham's* affairs having become much embarrassed, the defendants took possession of the premises assigned to them; and on the following day, *A. Clapham* executed an assignment for the benefit of his creditors. Upon this assignment, as an act of bankruptcy, a fiat issued on the 11th and *A. Clapham* was duly declared a bankrupt.

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For the plaintiffs it was contended, that the deed of the 8th of *July* was an act of bankruptcy; and *Gurney*, B., in summing up put the following questions to the jury:—*First*, Whether the deed was executed in contemplation of insolvency or bankruptcy? and the jury were of opinion that it was not. *Secondly*, Whether it was executed with an intent to give the defendants the means of taking possession of the property in the event of bankruptcy? and the jury were of opinion that it was. *Thirdly*, Whether the possession taken by the defendants on the 8th *January* was a *bona fide* possession, that is to say, whether they took possession with intent to keep it? the jury found that there was no real possession taken by the defendants. The jury having found a verdict for the plaintiffs, damages 12,889*l.* 12*s.* 3*d.*, the amount claimed independently of the value of the fixtures, leave was reserved for the plaintiffs to move to increase the verdict to 17,144*l.* 4*s.* 8*d.*, the difference being the value of the fixtures.

*F. Pollock* now moved accordingly.—The assignment of 8th *July* was an act of bankruptcy, and did not operate to convey even the fixtures to the defendants, who were parties to that assignment and cognizant of the act of bankruptcy. The jury found, in answer to the second question of the learned Baron, that the assignment was executed with an intent to give the defendants the means of taking possession of *A. Clapham's* property in the event of his bankruptcy. The defendants were creditors of *Clapham's*, and such an assignment made with such an intent is a fraud upon the other creditors, and an act of bankruptcy. A trader cannot assign his property so as to give a particular creditor the power at any time of stopping his business. Here the deed contained a power of sale, which authorized the defendants at any moment to seize and sell the whole of the party's stock in trade and utensils of manufacture, and at once to destroy his character of

trader. From the time of the execution of the deed, *Clapham* carried on business solely at the mercy and for the benefit of the Joint Stock Banking Company. No sooner was that deed intended to be acted upon than there was necessarily an end of *Clapham's* trading. The case comes within the rule, that, whenever a trader assigns so great a portion of his property as to be unable to carry on his trade, it is an act of bankruptcy.

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**Lord LYNDHURST, C. B.**—I have no doubt upon the question. If a trader requires an advance of money, a mortgage of his effects is good, the mortgagee not being a creditor. Here the assignment was to cover future as well as past advances (*a*), and the jury found that it was not made in contemplation of bankruptcy. Even where a trader mortgages the whole of his property, it is only a substitution of property of one kind for property of another kind; but here, *Clapham* had other property equal in value to the amount of the advances, to cover which the assignment was executed.

**PARKE, B.**—In order to render an assignment of a trader's effects an act of bankruptcy, it must be shewn that the party assigned all, or so nearly all of his effects, as to put it out of his power to carry on the trade. The plaintiffs in this case have failed in proving an assignment of all, or of any thing like all, the trader's property. In a case which occurred before my brother *Alderson*, at *Winchester*, a carter had assigned the whole of his stock in trade, consisting of a cart and horses, and it was contended that this amounted to an act of bankruptcy; but the Court held, that, to operate in that manner, it must be such an assignment as would produce insolvency.

(*a*) See upon this point what is said by Lord Kenyon in *Whitwell v. Thcompson*, 1 Esp. 72; and by Littledale, J., in *Hunt v. Mortimer*, 10 B. & C. 44; 5 Man. & Ry. 12, S. C.

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**ALDERSON, B.**—I do not think that we ought to disturb this verdict. *Clapham* was left in possession of property to an equal amount with the advances made by the bank. That property was sufficient to enable him to buy other stock. He was not, therefore, prevented from carrying on his trade, and the assignment was not an act of bankruptcy.

**GURNEY, B., concurring—**

The rule was refused (*a*).

(*a*) Bankhart & Co., being cotton-spinners, and indebted in a sum of upwards of 3000*l.*, assigned all the machinery of their mills to the creditor, with a proviso for redemption. No possession was taken under the deed; and it appeared that, if possession had been taken, the parties would have been unable to carry on their trade. The traders having other property besides that assigned, it was held that this assignment was not an act of bankruptcy. *Per Alexander, C. B.*—“This is an assignment of certain machinery only, and it does not,

on the face of it, import that it is an assignment of all the property of the bankrupt, with a colourable exception only; and upon that ground, we are of opinion that it does not, on the face of it, amount to an act of bankruptcy. If it be an act of bankruptcy, it is upon the ground of fraud only, in the sense in which it is used in the acts of Parliament, as a conveyance for the purpose of giving a fraudulent preference to a particular creditor.” *Balme v. Hutton*, 2 Y. & J. 101. See also *Baxter v. Pritchard*, 3 Nev. & M. 638.

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### YOUNG v. BECK.

A *capias* issued after the Uniformity of Process Act, upon an affidavit sworn before the passing of that act before the deputy signer of the bills of *Middlesex*, is not irregular.

**TRESPASS.**—First count, for assaulting the plaintiff, and arresting him under colour of a supposed writ of *capias* issued out of the *King's Bench*, and imprisoning and detaining the plaintiff in prison. Second count for assault and false imprisonment generally. Third count for a common assault. Pleas—first, the general issue; secondly, as to the assaulting, imprisoning, and detaining the said plaintiff in prison, as in the first count of

the said declaration is above mentioned, the said defendant by leave &c. says, that the said plaintiff ought not &c., as far as respects the said first count, because he says, that, before the time when &c., to wit, on the day and year aforesaid, in the county aforesaid, the said plaintiff was indebted unto him the said defendant in a certain sum of money, to wit, the sum of 22*l.* 13*s.* 8*d.* for goods sold and delivered by him the said defendant unto the said plaintiff; and the said plaintiff then and there undertook and promised the said defendant to pay him the said sum of money whenever afterwards he should be thereunto requested. But the said sum being wholly unpaid to the said defendant, and the said undertaking and promise wholly unperformed, he the said defendant, for the recovery of his damages by him sustained on occasion of the not performing of the said promise and undertaking of the said plaintiff, afterwards, to wit, on the day and year aforesaid, in the county aforesaid, sued and prosecuted out of the Court of our said lord the King, before the King himself, (the said Court then and still being holden at *Westminster*, in the county aforesaid), against the said plaintiff, a certain writ of our said lord the King, by which said writ our said lord the King commanded the sheriff of *Middlesex* that he should not omit, by reason of any liberty in his bailiwick, but that he should enter the same, and take the said plaintiff if he should be found in his said bailiwick, and him safely keep until he should have given him bail, or made deposit with him, according to law, in an action on promises, at the suit of the said defendant, or until the plaintiff should, by other lawful means, be discharged from his custody; which said writ afterwards, and before the delivery thereof to the said sheriff of *Middlesex* to be executed as hereinafter mentioned, was duly marked and indorsed for bail for 22*l.* 13*s.* 8*d.*, according to the form of the statute in such case made and provided; and afterwards, at the said time when &c., and whilst the said writ was in full force, to wit, on the day

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*Exch. of Pleas,* and year aforesaid, in the county aforesaid, the said plaintiff being then in custody of the said sheriff of *Middlesex*, at the suit of other person or persons, the said writ so indorsed was delivered to the said sheriff of *Middlesex*, by way of detainer against the said plaintiff, and] in due form of law to be executed, and the said sheriff thereupon detained the said plaintiff for the cause aforesaid, as he lawfully might, which is the supposed trespass &c.; and this he the said defendant is ready to verify; wherefore, &c.

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Replication.—And the plaintiff, as to the plea of the defendant by him secondly above pleaded as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith, that the plaintiff by reason &c., because he saith, that, at the time of the said sheriff detaining the plaintiff for the cause aforesaid, as in the said plea alleged, *there was no affidavit of the defendant's cause of the said action in that plea alleged made before any Judge or Commissioner of the said Court of our lord the King, before the King himself, authorized to take affidavits in the said Court, or before the officer who issued the said writ, or his deputy, and filed according to the form of the statute in that case made and provided;* nor was there any order, rule, or authority, of or from the said Court, or of or from any one or more of the Judges thereof, or of the Judges of the Court of our lord the King of the Bench, or of the Barons of our lord the King's *Exchequer at Westminster*, authorizing or empowering the defendant, or the said sheriff, or any other officer or person, to make the said detainer. And this the plaintiff is ready to verify, &c.

Rejoinder.—And the said defendant, as to the said replication of the said plaintiff to the said second plea of him the said defendant, says, that the said plaintiff ought not &c., because he says, that, before the suing out of the writ in the said plea mentioned, to wit, on the day and year aforesaid, in the county aforesaid, *an affidavit and affirmation of the said defendant's cause of the said action in*

*that plea alleged, was made by the said defendant before the deputy of the signer of the bills of Middlesex, and which signer of the bills of Middlesex was the officer who issued the said writ, to wit, on the day and year aforesaid, in the county aforesaid, in and by which said affidavit and affirmation the said defendant, being one of the people called Quakers, then and there solemnly affirmed that the said plaintiff was then justly and truly indebted unto him the said defendant in the sum of 25l. 13s. 8d. for goods sold and delivered by the said defendant to the said plaintiff, and at his the said plaintiff's request; and the said affidavit and affirmation so made as aforesaid was then and there filed in the office of the said signer of the bills of Middlesex, commonly called the bill of Middlesex Office, and was and continued to be so there affiled at the time of the sheriff so detaining the said plaintiff as aforesaid for the cause aforesaid, to wit, on the day and year aforesaid, in the county aforesaid; and this he the defendant is ready to verify.*

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**Surrejoinder.**—And the said plaintiff, as to the said rejoinder of the defendant to the said replication of the plaintiff to the said second plea of the defendant says, that the said affidavit and affirmation of the said defendant's cause of the said action in that plea alleged, was so made by the defendant before the said deputy signer of the bills of Middlesex, on the 15th day of *October*, in the year of our Lord 1832; and that the said signer of the bills of Middlesex was not, at the time of the said defendant's making the said affidavit and affirmation as aforesaid, an officer whose office or duty it was to issue, or who had any power or authority to issue, the said writ; and this the plaintiff is ready to verify, &c.

**Demurrer, and joinder in demurrer.**

**Archbold**, for the defendant.—The question intended

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to be raised upon these pleadings for the opinion of the Court is, whether a writ of *capias* sued out since the passing of the act for the uniformity of process, upon an affidavit sworn previously to the passing of the act, before the deputy signer of the bills of *Middlesex*, is good. But there is a preliminary question, *viz.* whether the surrejoinder is not bad, as being a departure from the replication. The declaration is in trespass for assault and false imprisonment: the pleas—first, not guilty; and secondly, that the plaintiff was indebted to the defendant, and that the defendant sued out a *capias*, and delivered it to the sheriff, &c. To this the plaintiff replies, that there was no affidavit of the defendant's cause of the said action in that plea alleged, made before any Judge or Commissioner of our said lord the King, &c., authorized to take affidavits in the said Court, or before the officer who issued the said writ, or his deputy, and filed according to the form of the statute in that case made and provided. The rejoinder sets out the affidavit, and shews that it was sworn before the deputy signer of the bills of *Middlesex*, “which signer of the bills of *Middlesex* was the officer who issued the said writ.” The surrejoinder then alleges, that the *said* affidavit was so made by the defendant before the said deputy signer of the bills of *Middlesex*, on the 15th October, 1832; and that the *said* signer of the bills of *Middlesex* was not at the time of the defendant's making the affidavit an officer, whose office or duty it was to issue, or who had any power or authority to issue, the *said* writ. The surrejoinder is a departure from the replication. The replication alleges that there was *no* affidavit; the surrejoinder admits that there was an affidavit, but insists that it is irregular. The authorities on the subject of departure in pleading are collected in *Comyn's Digest* tit. *Pleader*, (F. 7). Amongst the instances of departure there cited is this:—Debt on bond, to perform an award. If the defen-

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dant pleads no such award, and the plaintiff shews such an award, and assigns a breach, and the defendant rejoins that the award is bad ; this is a departure," and for this are cited *Raym. 94, 1 Sid. 180, and 2 Roll. 692, l. 40.* So, if a bond be to perform covenants, and the defendant pleads performance, and, a breach being assigned for non-payment of rent, rejoins that he was expelled. *Raym. 22, 1 Sid. 77.* The case of *Praed v. The Duchess of Cumberland* (*a*) is expressly in point. There, to debt, on an annuity bond, the defendant pleaded no such memorial as the statute requires ; to which the plaintiff replied, that there was a memorial which contained the names of the parties, &c., and the consideration for which the annuity was granted. The defendant rejoined that the consideration was untruly alleged by the memorial to have been given to both obligors, &c., and this rejoinder was held bad, because it was a departure from the plea. *Ashhurst*, Justice, says, "The rejoinder is clearly a departure from the plea in bar ; a memorial was inrolled, which upon the face of it was a good one ; and if the defendant wished to impeach it, she should have pleaded it, and shewn in what particular it was defective, and thus have compelled the plaintiff to take issue upon that fact. But, having in her plea in bar alleged that there was no memorial, she ought not afterwards to be permitted to admit in her rejoinder that there was one, and then deny the validity of it." This case was affirmed on error in the Court of *Exchequer Chamber* (*b*). The marginal note to the report of the case in error is as follows :—" To an action of debt on a bond given to secure an annuity, the defendant pleaded that no such memorial was inrolled as is required by the statute ; the replication stated that a memorial was inrolled, containing the particulars which the statute directs ; the rejoinder alleged, that the memorial in the replication mentioned did not

(*a*) 4 T. R. 585.

(*b*) 2 H. Bl. 280.

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was granted. This was clearly a *departure* from the plea." [Parke, B.—In that case the objection in reality was to the deed insisted on in the rejoinder; the defect was, that the *deed* was void (a). Lord Chief Justice *Eyre* says, "The plea in effect states that there was no memorial; the replication alleges a memorial containing the requisites which the law requires; and then the rejoinder introduces a fact which goes to vitiate the *deed*, but not the memorial." The marginal note of the case in *Henry Blackstone*, therefore, is clearly incorrect.] There are two cases which will be cited on the other side, but which on examination are distinguishable, *Fisher v. Pimbley* (b), and *Dudlow v. Watchorn* (c). In *Fisher v. Pimbley*, the award was bad upon the face of it; it was not made in the cause, nor pursuant to the submission, and was in fact a mere nullity. In *Dudlow v. Watchorn*, the decision turned wholly upon the form of the plea, in containing the word *duly*, and the rejoinder supported the plea, in shewing that the *ca. sa.* was not *duly* sued out. "The rejoinder," Lord *Ellenborough* says, "shewing an answer to the replication, setting out a *ca. sa.* sued into *Middlesex*, that it was issued into a wrong county, and, therefore, would not operate to charge the bail, sustains the bar that no *ca. sa.* had *duly* issued, instead of being a departure from it." Lord *Ellenborough* lays great stress on the word *duly*. If that word had been inserted here, the case would have been wholly different, for then, as in *Dudlow v. Watchorn*, there would have been nothing inconsistent between the replication and the rejoinder.

(a) So it is said by Bayley, J., (*Dudlow v. Watchorn*, 16 East, 41), that "the ground on which that judgment was affirmed in error was, that the rejoinder introduced a fact which went to vitiate

the deed granting the annuity, and not to shew that there was no memorial of the bond."

(b) 11 East, 188.

(c) 16 East, 39.

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The second question depends upon the construction of the statute 12 Geo. 1, c. 29. By the second section of that statute it is enacted, "that, in all cases where the plaintiff's or plaintiffs' cause of action shall amount to the sum of 10*l.* or 40*s.* or upwards as aforesaid, affidavit shall be made and filed of such cause of action, which affidavit may be made before any Judge or Commissioner of the Court out of which such process shall issue, authorized to take affidavits in such Courts, or else before the officer who shall issue such process, or his deputy, which oath such officer or his deputy is hereby empowered to administer." This clause is directory only, while the first clause uses imperative language, and shews the distinction. The second section merely directs an affidavit to be made, and the officer is *empowered* to administer the oath. The question is not, whether this affidavit was *irregular*, but whether it was void. It was decided by one of the learned Judges of this Court, that the process upon the affidavit was so far irregular, that the defendant was entitled to be discharged out of custody (*a*); but it is not necessary to question that decision; in order to shew that this is a departure, all that it is requisite to substantiate is, that the affidavit is not a nullity. At the time that it is sworn, it was sworn before the proper officer, and perjury might have been assigned upon it. If the construction of the statute 12 Geo. 1, which must be contended for on the other side, be correct, no person could be held to bail upon a foreign affidavit, because it has not been sworn before a Judge or Commissioner, &c. [*Parke*, B.—The statute did not intend to touch that case.] In practice it has been usual to issue writs upon affidavits not sworn before the officer who issues the writ, as in the case of a *latitat* issued upon an affidavit sworn before the signer of the bills of *Middlesex*. [*Alderson*, B.—That proceeded on the ground that it was a continuation of the same process.]

(*a*) *Beck v. Young*, 2 Dowl. P. C. 462.

*Eccles. of Pleas, Parke, B.*—So, an affidavit sworn before the filacer of  
1834. *Cambridgeshire* has been held sufficient to support a *testatum capias* into *Devonshire*, on the ground of the filacer for *Cambridgeshire* being the proper officer to issue

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writs into *Devonshire*. *Evans v. Bidgood* (*a*). *Alderson, B.*—In *Richards v. Stuart* (*b*), it was held, that after discontinuing the action it was not necessary, in issuing a fresh writ, to have a fresh affidavit. But the question here is, whether it is sufficient that the affidavit was sworn before a person who, at the time, had authority to issue a writ, but not the writ in question, there being at that time no such form of writ in existence.] The case of *Richards v. Stuart* is a stronger case than the present, for by a discontinuance the whole action is at an end. [*Alderson, B.*—*Tindal, C. J.*, there says, “All that the fair import of these words (12 Geo. 1, c. 29) demands has been done in this present instance. An affidavit of the cause of action *has* been made and filed—of the cause for which the defendant is now arrested; for, there is no pretence for saying that the arrest was for a different cause of action. But it has been urged that the deponent could not be indicted for perjury. I am unable to perceive why he should not, if the affidavit be untrue; for, if he used it in the second arrest, it is the affidavit of the cause of action in that proceeding.”] The writ of *capias* under the new statute must be regarded, where it is necessary, as a continuation of the bill of *Middlesex*, otherwise great injustice would ensue. Suppose the case of a bill of *Middlesex* issued before the new act, for the purpose of saving the statute of limitations, the only mode of preventing a plea of the statute would be to continue that process by issuing a *capias*. [*Parke, B.*—What clause of the Uniformity of Process Act prohibits

(*a*) 4 Bing. 63.

(*b*) 10 Bing. 322, 3 Moore & Scott, 778; 2 Dowl. P. C. 754, S. C. See also *Copping v. Potter*, 10 Bing. 441, 2 Dowl. P. C. 785,

the issuing of the old process in such a case (*a*)? The language of that act is future, that all writs shall be according to that form in the schedule.] It is not upon the Uniformity of Process Act that this depends, but upon the 3 & 4 Will. 4, c. 67 (*b*), by which the officer of signer of the bills of *Middlesex* is abolished. [Parke, B.—That statute relates to writs to be issued in compliance with the Uniformity of Process Act, "from and after the passing of the act." It does not prevent the officer from signing a continuing writ in an action commenced before the Uniformity of Process Act. The difficulty is, that the affidavit was not made before the officer who actually did issue the writ. It would be otherwise in the case of an affidavit sworn before a Judge or a Commissioner, for they have an absolute authority, not depending upon their happening to fill some other character.]

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*Chandless, contra.*—First, as to the objection that the surrejoinder is a departure from the replication. It is a well established principle of pleading, that when a pleading contains new matter which maintains and fortifies, and is not contradictory to the former pleading of the party, it is no departure. The first question upon the surrejoinder is, whether there is any *legal* affidavit (for if not, there is in contemplation of law no affidavit at all), and, secondly,

(*a*) See *Finney v. Montague*, 2 Nev. & M. 804, where it was held that an alias bill of *Middlesex*, issued after the Uniformity of Process Act, might be sealed with the seal usually affixed to the writ of summons.

(*b*) By the first section of that statute, it is enacted, that "from and after the passing of this act, all writs of summons, *distringas*, *capias*, and *detainer*, issued into the county of *Middlesex* from the

Court of King's Bench, shall be signed, sealed, and issued, and the fees thereon shall be taken and accounted for by the same person or persons, and in like manner, as all other writs of summons, *distringas*, *capias*, or *detainer* issued from the said Court of King's Bench, under and by virtue of the said recited act; any law, custom, or usage to the contrary notwithstanding.

*Exch. of Pleas,* whether the surrejoinder shews that there was no legal affidavit. The case has been argued on the other side as if the statement of new facts in the surrejoinder rendered it a departure, although those *facts* fortified and supported the replication. *Praed v. The Duchess of Cumberland* has been cited to shew that this is a departure; and it is said, that that decision was affirmed in error, but it was affirmed, as already observed by the Court, upon another ground. It was cited in the case of *Dudlow v. Watchorn*, but was distinguished by Mr. Justice Bayley. In the case of *Praed v. The Duchess of Cumberland*, the Court of King's Bench appear to have proceeded very much on the authority of the case of an award, Mr. Justice Buller observing, that, "in the case of an award, if there be an award in point of fact, the party cannot on the trial of an issue of *no award* go into objections to the award in point of law" (a). Now this is expressly contradicted by the case of *F her v. Pimbley*. There Lord Ellenborough says, "The award being bad, the only question is, whether the defendant can shew such bad award in his rejoinder, consistently with his former allegation in the plea, that there was no award?" His Lordship adds, "He thereby still maintains his former allegation that there was no award; in other words, that there was no legal and valid award under the submission, which is the same as no award. There is no inconsistency in this, and therefore no departure." The case of *Dudlow v. Watchorn* is a precise authority upon the present question, and shews that the statement of new *facts* in a subsequent pleading is no departure, provided those facts fortify and sustain the previous pleading. [Parke, B.—You deny in your replication that there was any affidavit, and in your surrejoinder you admit that there was one; but state, that it was not made according to law]. The averment that an act has

(a) 4 T. R. 588.

not been done is the same as an averment that it has not been *legally* done. Case of the *Abbot of Strata Marcella* (a).

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Upon the second point, with regard to the necessity of the affidavit being sworn before the officer who issues the writ, it has been held in a variety of cases that the 12 Geo. 1, c. 29, s. 2, is imperative on that subject. *Dalton v. Barnes* (b), *Anderson v. Hayman* (c), *Morrison v. Muspratt* (d), *Boyd v. Durand* (e), *Dorville v. Whoomwell* (f), *Baker v. Allen* (g). Was the officer who took the affidavit in this case the officer who issued the writ? It is true that he was the same man, but he was not the same officer; and the statute does not require an identity of person but of character. The question is, did he at the time of issuing the writ bear the same character? He could not do so, for when he issued the writ he was acting in the duties of an office subsequently created by statute. [Alderson, B.—Is there not a late case on this subject with regard to writs issued by the plaintiff?] *Rodwell v. Chapman* (h). In that case the officer had authority to issue the writs into both counties at the time of his taking the affidavit. [Parke B.—How does it appear that this process was issued since the Uniformity of Process Act?] The plea sets out the *capias*, and the court will take notice judicially that the form of the writ is that prescribed by the new statute. The time also alleged in the pleadings shews that fact. In the absence of all evidence to the contrary, the time must be taken to be truly stated.

*Cur. adv. vult.*

(a) 9 Rep. 24, a.

(f) 3 Bingh. 39.

(b) 1 M. & S. 230.

(g) 7 B. & C. 526; 1 Man. &

(c) 2 B. Moore, 192.

Ry. 232.

(d) 4 Bingh. 60.

(h) 1 Cr. & M. 70.

(e) 2 Taunt. 161.

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<sup>v.</sup>  
BECK.

The judgment of the Court was now delivered by—

PARKE, B.—Several questions arose upon this record; but as the Court are of opinion in favour of the defendant upon the principal point, it is unnecessary to advert to the other objections which were urged on his part.

The plaintiff contends, that the process of *capias* under which the defendant justifies, and which was issued since the passing of the 2 Will. 4, c. 39, by the deputy signer of the bills of *Middlesex*, upon an affidavit sworn before the same officer, on a day anterior to the passing of the act, was void, because it is alleged to be essential that the officer who takes the affidavit should, at the time of administering the oath, have the power by law to issue the process which he afterwards does issue; and it was insisted that the deputy signer of the bills of *Middlesex* had not on the 5th of October, 1832, when the affidavit was made, any authority to issue the new *capias* given by the Uniformity of Process Act. And the decision in this same case of *Young v. Beck*, in 2 *Dowling*, P. C. 462, before me, sitting in the Bail Court in the *King's Bench*, was relied upon. I certainly did so decide, and directed the now plaintiff to be discharged upon entering a common appearance, under the impression that the *capias* given by the act was altogether a *new process* dissimilar from that which existed before, and that the deputy signer of the bills of *Middlesex*, before the act passed, had no power to issue any such process. That point seems to have been taken for granted on the argument in the *King's Bench* on all sides. My brothers are of opinion that my decision was wrong, and, upon more attentively considering the effect of the act of Parliament, I concur with them.

It does not appear to us, that the writ of *capias*, in the form directed by the statute, is altogether a *new process*. It is a writ directed to the sheriff of *Middlesex*, command-

ing him to take the body of the defendant as the bill of *Middlesex* did before; and though it is not returnable in the same manner, and differs in other respects, it is still the same kind of process which existed before against the person. Suppose, instead of the act of Parliament mentioning the form of the process against the person, a rule of Court had ordered the omission of the name of the nominal co-defendant, or of the insertion of "the custom of the Court," or other similar matter, there could be no doubt but that the process would have continued the same, and could have been issued, after such a rule of Court, on an affidavit sworn before it. Can it be deemed less the same process as before, because alterations are made by statute, and the return is uncertain instead of fixed, and other matters are introduced into the writ addressed to the defendant himself? It is not immaterial to observe, that the act of Parliament with respect to writs of summons, which are addressed to the party instead of the sheriff, and in no respect resemble the old serviceable process, does contain a provision that they shall be issued by the same officer by whom serviceable process was before issued; but it is silent with respect to writs of *capias*, possibly because the legislature considered such a provision unnecessary, as the nature of the writs remained the same, and the same officers would, as a matter of course, continue to issue them.

We, therefore, think that this affidavit was properly taken, having been sworn before the deputy signer of the bills of *Middlesex*, who had at the time power to issue a writ against the person into *Middlesex*, and did afterwards issue such a writ, and, consequently, our judgment must be for the defendant.

Judgment for the defendant.

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GILES v. SMITH.

In an action by a bankrupt against his assignees to try the validity of his commission: —  
*Held*, that the assignment having been lost before it had been entered of record pursuant to the 6 Geo. 4, c. 16, s. 96, secondary evidence of its contents might be given.

THIS was an action of trover brought by the plaintiff to try the validity of a commission of bankruptcy issued against him, under which the defendant had been appointed assignee. At the trial, before *Parke*, B., at the *Middlesex* Sittings after *Trinity Term*, the defendant proved his title as assignee in the usual manner, with the exception that he did not produce either the commission, or the assignment; both those documents being proved to have been lost (*a*) in the course of certain proceedings which had taken place in the Court of Review. To supply this defect, the defendant gave in evidence a copy of the commission, which had been entered of record (*b*), and a coun-

(*a*) Where a fiat had been accidentally lost, the Court of Review directed a new fiat to be issued, observing that a duplicate fiat had never yet been heard of. *In re Levett*, 1 Mont. & Ayr. 308.

(*b*) By the 6 Geo. 4, c. 16, s. 96, it was enacted, "that, in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any Court of law or equity, unless the same shall have been first so entered of record as aforesaid; and the person so appointed to enter matters of record as aforesaid, shall be entitled to receive for such entry of such commission, adjudication of bankruptcy, assignment, or order for vacating the same respectively, having the cer-

tificate of such entry indorsed thereon respectively, the sum of two shillings each; and for the entry of every certificate of conformity, having the like certificate indorsed thereon, six shillings; and every such instrument shall be so entered of record upon the application of or on behalf of any party interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose; and the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be entered of record as aforesaid; and also appoint such fees and reward for the labour therein of the person so appointed as aforesaid, as the Lord Chancellor shall think reasonable; and all persons shall be at liberty to search for any of the matters so entered of record as aforesaid, provided that, on the

terpart of the assignment which had been entered of record, the assignment itself having been lost before it was entered of record. Evidence was also given of the proceedings which had taken place in the Court of Review upon a petition by the plaintiff to supersede the commission (*a*), upon which occasion that Court dismissed the petition. The defendant likewise produced and proved two receipts signed by the plaintiff, and dated the 2nd of *July*, 1830, and the 14th of *October*, 1831, for money allowed him by the defendant as assignee. It was also in evidence that the defendant had acted as assignee. This evidence was objected to as insufficient; but the learned Baron thought that it amounted to *prima facie* proof of the defendant's title as assignee, and a verdict was found for the defendant, with leave to move to set it aside and enter a verdict for the plaintiff.

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1834.*

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SMITH.

*Bompas, Serjt.*, having obtained a rule accordingly—

*Pollock* and *Bonsor* now shewed cause.—It was not necessary to the defendant's case that the assignment should be proved, and if it was necessary there was sufficient evidence given. After a trading, petitioning creditor's debt, and an act of bankruptcy have been proved, although it is necessary to go further where a party claims as plaintiff, and sets up a title in himself under a particular assignment, yet it is otherwise with regard to a defendant,

production in evidence of any instrument so directed to be entered of record, having the certificate thereon, purporting to be signed by the person so appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record as afore-be dismissed with costs.

(*a*) The petition, after setting forth the issuing of the commission against the plaintiff, stated that the defendant "was chosen assignee." The prayer of the petition was, that the commission might be annulled and superseded, at the expense of the petitioning creditor, &c. The order of the Court was, that the petition should be dismissed with costs.

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who may rest his case upon the fact of the title having passed out of the plaintiff. In answer to him, it is sufficient to shew, as here, a valid commission; for upon that commission it must be presumed that there has been an assignment to some one, and it is quite immaterial whether the property has passed to the defendant in the suit, or to some one else. [*Parke, B.*—Is the title gone out of the bankrupt before assignment?] It is difficult to say it is gone, and yet it is difficult to say that it remains. The Court will presume that the usual course of proceeding has been pursued, and that an assignment has been executed. [*Parke, B.*—An assignment to any one would certainly be an answer to the action.] The evidence of admission on the part of the plaintiff was also sufficient to dispense with the necessity of proving the assignment as against him. It appeared that he had received an allowance from the assignee, for which he had given receipts; and although that transaction might not prevent him from afterwards disputing his bankruptcy, yet, if he so far dealt with and recognised the defendant in his character of assignee, he has raised, as against himself, a *prima facie* title in the defendant (*a*). The proof of the proceedings in the Court of Review was offered on the same principle. [*Parke, B.*—The assignment was not in discussion in the Court of Review; the question there was, whether the adjudication could be supported.] The defendant appeared in that Court as assignee, and the plaintiff litigated the matter with him there as such. The plaintiff did not say, that, supposing himself to be a bankrupt, the defendant was not his assignee; on the contrary, he admitted him to be such, but he said that the commissioners had erred in adjudging him to be a bankrupt. The only case which can be cited

(*a*) As to the admissions by a bankrupt of the title of his assignees, *vide ante*, p. 436, n. See

also *Ex parte Davy*, 1 Mont. & A. 297, as to the acquiescence of a bankrupt under a fiat.

on the other side as parallel with the present case is that of an unstamped instrument. It may be admitted, that the Court will be bound by an analogy derived from the stamp laws. But no one can fail to perceive that the decisions upon the Stamp Acts have proceeded upon reasons which do not exist here. If parties should be permitted to give other evidence of instruments which have been destroyed before they have been stamped, it would obviously lead to perpetual frauds upon the revenue. Many instruments are required to bear the stamp at the time of execution; but an assignment under the bankrupt law is good without being entered of record, and may be so entered at any time previously to its being produced in evidence. The case of instruments which may be stamped, upon payment of a penalty, after execution, is wholly different from this. If an agreement be executed, and then lost or destroyed, the parties may execute a fresh agreement, and procure it to be stamped; but, in the case of an assignment, if lost before being entered of record, no fresh assignment can be made, the subject matter of it having already passed out of the assignor, and nothing would remain upon which the fresh deed could operate. There would be no method, therefore, of repairing the loss. [Alderson, B.—The assignment itself was valid, without any entry of record. Parke, B.—The entering it of record is only a preliminary to the production of the deed in evidence.] The object of the 96th section, originally, was to make a copy of the inrolled deed evidence, without calling the subscribing witness, but by some means that object has been defeated, and the public are now burthened with the expense of an useless enrolment. [Alderson, B.—The words of the Stamp Act, with regard to the effect of the want of a stamp, differ from those used in the Bankrupt Act with regard to the want of the deed being entered of record. In the Stamp Act the words are, that the unstamped instrument shall not be

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admitted in any Court to be good, useful, or available (a). That is much stronger than a mere exclusion from being given in evidence.

*V. Lee, contrd.*—The defendants did not shew that the property had ever passed out of the bankrupt. In order to do so, it was necessary to prove the assignment, and they could not give any evidence of it without shewing that it had been duly entered of record. The words of the 96th section of the Bankrupt Act are very strict, “that no such instrument shall be received as evidence in any Court of law or equity unless the same shall have been first entered of record.” If the original assignment itself had been produced at the trial, instead of the secondary evidence of its contents, it would not have been admissible; how, then, can a copy of it be received? The cases with regard to the inadmissibility of unstamped documents are analogous to the present. [*Alderson*, B.—There is this distinction besides that already noticed, that, in the case of unstamped documents, it does not appear whether or not they will be permitted to be stamped. In *Rippiner v. Wright* (b), the Court observe, “It is not possible now to say whether or not the commissioners of stamps, in the exercise of their discretion, would have permitted this agreement, if it had remained in existence, to be stamped on payment of the penalty.”] There was no evidence of such admissions made by the plaintiff as were sufficient to bar him from maintaining this action. He never acknowledged the title of the defendants. [*Parke*, B.—If he transacted business with any person as assignee, that would shew the title out of him. But there does not appear to have been evidence of his transacting with any person in the character of assignee. If such evidence had been given, the defendants would have relied upon it

and stopped short.] The proof of the proceedings in the Court of Review is in favour of the plaintiffs. There, so far from admitting the title of the defendants, the prayer of the petition was, that the commission should be annulled and superseded.

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PARKE, B., now delivered the judgment of the Court — This was an action of trover, brought by the plaintiff against the defendant, for seizing and selling the plaintiff's goods. The defence was, that a commission of bankruptcy duly issued against the plaintiff, and that the defendant was the assignee under that commission. Upon the trial before me at *Guildhall*, the trading of the plaintiff was admitted, and the act of bankruptcy and petitioning creditor's debt proved to the satisfaction of the jury; the commission duly recorded was produced, but the assignment from the commissioners to the assignee was not. It was proved that a sufficient search had been made for this document without success, to let in parol evidence of its contents, (supposing such evidence to be admissible), and sufficient secondary evidence of the contents was given; but it also appeared that the assignment never was entered of record, pursuant to the statute 6 Geo. 4, c. 16, s. 96; and it was objected by the learned counsel for the plaintiff that secondary evidence of the assignment was inadmissible. I directed a verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for the value of the goods seized and sold by the defendant; and, a rule *nisi* having been granted early in the term, cause was shewn on *Friday* last.

Three points were made on the argument for the defendant:—

1st, That the commission and the requisites to support it having been proved, it was unnecessary for the defendant to give any evidence that he or any one else was the assignee, though he must have done so, if he had

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been suing as plaintiff, to recover the debts or effects of  
the bankrupt.

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2ndly, That there was *prima facie* evidence of the defendant's title as assignee as against the plaintiff, without referring to the proof of the loss of the assignment, and of its contents, which might therefore be rejected altogether.

And, 3rdly, It was insisted, that, if the defendant was obliged to rely on the proof last mentioned, such proof was legally admissible, though the assignment never had been recorded.

We have no doubt but that it was incumbent on the defendant to prove, not only that a commission duly issued against the plaintiff, including the trading, petitioning creditor's debt, and act of bankruptcy, but that the property in the goods in question was devested from the bankrupt by an assignment by the commissioners to some person (a). We also think, upon referring to the notes of the trial, and the documents adduced, that there was no evidence of the plaintiff's admission of the defendant's character, or that of any one else as assignee, so as to raise the question whether this would supersede the necessity of proving the assignment itself; and, therefore, the only question for our consideration is, whether the assignment was duly proved. The objection on the part of the plaintiff is, that the 96 sect. of the 6 Geo. 4, c. 16, provides, that no assignment of the personal estate of the bankrupt shall be received as evidence in any Court of law or equity unless the same shall have been first entered of record, as directed by the 95th sect. And it was argued, that, unless the assignment had been so recorded, no evidence was admissible to prove it, an objection which would go to the extent of excluding not secondary evidence merely, but

(a) As to the passing of the property out of the bankrupt see *593; Warner v. Barber*, 8 Taunt. 176; *Brassey v. Dawson*, 2 Str. 978; *Turner v. Richardson*, 7 East, 336; *Laroche v. Wakeman, Peake, N. Copeland v. Stephens*, 1 B. & A. P. C. 140.

any other proof of the title of the assignee, short of some *conclusive* admission of it by the opposite party. In support of this objection, the several decisions on the stamp acts, by which it was held, that, if an instrument requiring a stamp had been lost or destroyed before it was stamped, no parol evidence could be given of its contents, were referred to as analogous to the present case. But we are of opinion, that there is a material distinction between the clause in question and the provisions of the stamp laws, the first of which is found in the statute 5 Will. 3, c. 21, s. 11, and which is repeated with some variations, not important to the present question, in several subsequent statutes. That section enacts, "that no record, deed, instrument, or writing, shall be pleaded or given in evidence in any Court, *or admitted in any Court to be good, useful, or available in law or in equity*, until the vellum, parchment, or paper, &c., on which such deed, trust, or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp." Under such a provision, there could be no doubt that an instrument which was lost or destroyed without being stamped could not be held to be valid or available, for the words of the clause are express and positive, that it should not; and if the instrument, whether of contract or conveyance, was inoperative, parol evidence of its contents was useless. But in the 96th section of the Bankrupt Act, there are no such words; on the contrary, it is quite clear that the assignment did operate to transfer the property from the bankrupt from the moment of its execution; and there is no expression from which it is possible to collect the intention of the legislature, that a default in entering the assignment of record should deprive it of legal validity; and it seems absurd to impute such an intention, when it is considered that the effect would be to revest the property in the bankrupt; and if it be said, that although the instrument is not by default of enrolment rendered absolutely invalid, yet that there can be no evidence of it given by the

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assignee, the result would be that the property would continue in him, without the power of disposing of the goods, or recovering them from a wrong-doer, in all cases in which the instrument should have been destroyed or entirely lost. The Court would be very reluctant to adopt such a construction of a clause evidently intended for the benefit of the creditors, either by preserving evidence of the title of the assignee, and making it more secure, or perhaps affording a more easy mode of proving it, though the latter object, if it existed, has been defeated by a decision of this Court in the case of *Gommersall v. Serle* (a). We do not, however, feel any difficulty in saying, that the words of the section in question require no such construction; and that they mean only that the assignment *itself*, if offered in evidence, shall not be received, unless it shall have been first entered of record; but that any other legal evidence is admissible. If, therefore, the assignment is capable of being produced, it must be given in evidence, and must first be recorded; but, if it is not capable of being produced, its contents may be proved by secondary evidence. The construction insisted upon by the plaintiff would be productive of most mischievous consequences, and would leave it in the power of fraudulent or negligent assignees to defeat the interests of creditors, by destroying or losing the commission or assignment.

We think, for these reasons, that the evidence was properly received, and that the rule to enter a verdict for the plaintiff must be discharged.

#### Rule discharged (b).

(a) 2 Y. & Jer. 5. In which case it was held, that the entering the assignment of record pursuant to the 6 G. 4, c. 16, s. 96, does not dispense with the proof of its execution. But Lord Tenterden received evidence of the assignment

without such proof. *Tucker v. Barrow*, M. & M. 139. See 1 Chitty Coll. St. 110, n.

(b) See stat. 2 & 3 W. 4, c. 114, as to entering proceedings of record in the Court of Bankruptcy.

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SLOMAN v. COX.

**ASSUMPSIT** upon two bills of exchange.—The first bill, dated the 16th *March*, 1833, and payable three months after date, for the sum of 18*l.*, was drawn by the defendant upon and accepted by a person named *Jones*, and indorsed to the plaintiff. The second bill, dated the 20th of *June*, and payable two months after date, was also drawn by the defendant upon and accepted by *Jones*, and indorsed to the plaintiff. At the trial, before Lord *Lyndhurst*, C.B., at the last Sittings for *Middlesex*, it appeared that the first bill having been dishonoured, the plaintiff agreed to take 8*l.* in cash, and another bill for 10*l.*, and accordingly the second bill was drawn and indorsed to the plaintiff, and the bill for 18*l.* was given up to the acceptor. After the acceptance of the second bill, and before it became due, *Jones*, the acceptor, without the concurrence of the defendant, but while the bill was in his hands, altered the date of the bill from the 20th of *June* to the 24th. The bill for 18*l.* was subsequently obtained by the plaintiff from the acceptor. The jury found that the bill of the 20th *June* had been altered without any fraudulent intention. A verdict was found for the plaintiff upon the count on the first bill, and the learned Judge gave the defendant leave to move to enter a nonsuit. A rule having accordingly been obtained by *R. V. Richards*—

The holder of a bill for 18*l.*, which had been dishonoured, agreed to take 8*l.* in cash and another bill for 10*l.* from the drawer. The drawer accordingly drew another bill upon the same acceptor for that amount; while in the hands of the drawer, the acceptor, without the knowledge of the drawer, altered the date and vitiated the bill:—*Held*, that the latter bill being a nullity, the first was not discharged, and that the drawer was liable upon it.

**Platt** now shewed cause.—The first bill having been dishonoured, the plaintiff claimed the amount from the defendant, the drawer; but an agreement was entered into that the defendant should not be sued upon that bill on condition of his paying 8*l.* and giving another bill for the residue. Another bill meant another good bill; but the defendant gave the plaintiff only a piece of waste paper. The bill had been vitiated by the alteration; and it is quite immaterial whether that alteration was or was not made

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with the concurrence of the defendant. He was bound to give a good bill, and has not done so; and the condition upon which the former bill was given up not having been performed, the plaintiff is remitted to his right to sue upon that bill, and the verdict is correct.

*R. V. Richards and Ball, contrà.*—The jury have found that *Cox*, the defendant, was no party to the alteration. He, therefore, has done all that, according to his engagement with the plaintiff, he was bound to do. He has drawn a valid bill, which he delivered over to *Jones*, the acceptor, who acted as agent for both parties, and this must be regarded as a delivery to the plaintiff. It was the duty of the plaintiff to see that he got an unaltered bill. The defendant himself was injured by the alteration; for, instead of receiving notice on the 23rd *June*, he would not, according to the altered bill, receive it until the 27th.

**PARKE, B.**—The question in this case is a simple one. The defendant is liable to the plaintiff as the drawer of a bill for 18*l.* Being sued upon that bill, he shews, in order to prove payment, that, in consequence of an agreement with the plaintiff, he gave him 8*l.* in cash and a bill for the remainder. That bill turns out to be, in fact, of no value, having been vitiated by an alteration. The defendant, therefore, not being liable on the second bill, still remains liable upon the first.

**ALDERSON, B.**—The case resembles that of a bill given and subsequently dishonoured, which is no payment. The plaintiff was entitled to repossess himself of the former bill, upon which he still retained his right to sue.

The rest of the Court concurred.

Rule discharged.

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1834.

## PHIPSON v. HARVETT.

THIS action was brought to recover back the sum of 9d., being the amount of a certain toll demanded by and paid to the defendant by the plaintiff at the turnpike gate at a place called the *Five Ways*, in the county of *Warwick*, the liability to pay such toll being at the time disputed by the plaintiff, and the payment being made under protest. The defendant was lessee of the tolls, and as such was entitled to receive the toll demanded, if the same were legally payable at the said gate. By an act of Parliament passed in the 58 Geo. 3, intituled "An Act for repairing the road from *Blakedown Pool*, in the parish of *Hagley*, and county of *Worcester*, to *Birmingham*, in the county of *Warwick*," after reciting three prior acts for repairing the same road, and that the trustees had from time to time improved and repaired the same road, and had borrowed on the credit of the tolls authorized to be taken on the said road divers sums of money, which were still due and owing, with an arrear of interest, and which could not be paid off, nor could the said road be effectually amended, varied, improved, and kept in repair unless some of the powers of the said acts were altered and enlarged, and the tolls increased, and that it was desirable that the said powers should be contained in one act; it is enacted, that the said act and the term and tolls thereby granted should be liable to the payment of all the monies which had been borrowed or were due and owing on the credit of the tolls, and of all the interest due and to grow due thereon, as fully and effectually as if such money had been borrowed or become due and owing on the credit of the tolls granted by the said act. And it is further enacted, that certain persons therein named should be and were thereby appointed "trustees for repairing, altering, varying, widening, and improving the road leading from

Where tolls are payable by persons passing along a turnpike road, and an act of Parliament exempts and prohibits the trustees of such road from repairing a certain portion of it, and imposes the liability on others but is silent on the subject of tolls, such portion still continues for the purposes of toll to be a part of the turnpike road.

*Exch. of Pleas.*, *Blackdown Pool*, in the parish of *Hagley*, in the county of *Worcester*, to the *Cross Hands*, near to *Holloway Head*, and from thence to the top of *Smallbroke Street*, and from the *Five Ways*, in the parish of *Edgbaston*, to *Easy Row*, in *Birmingham*, and for otherwise putting the said act into execution." And it is further enacted, that the said trustees might and they are thereby authorized to continue all or any of the toll-gates and toll-houses which had been erected in, upon, or across any part of the said road by virtue of the said acts, and should and might erect or cause to be erected such and so many other toll-gates and toll-houses in, upon, or across any part of the said road by this act directed to be widened, varied, improved, or kept in repair, and also such and so many toll-gates and toll-houses by the sides of the said road, and in, upon, and across any street, lane, or bye-way that did or should lead into or out of the same, as they, the said trustees, should think proper or expedient, subject to such restrictions and directions as are thereafter mentioned, and to provide the said toll-houses with a garden and proper conveniences; provided, nevertheless, that no toll-gate shall be erected between the said place called the *Five Ways* and the town of *Birmingham*. It is further enacted, that it should be lawful for the said trustees and their collectors to demand and take the tolls and duties therein particularly mentioned, subject to the restrictions thereafter contained, at the toll-gates, or toll-bars, or side-bars, or side-gates already erected on the said road by virtue of the acts thereby repealed, and which, by virtue of the now reciting act, should be continued or erected upon, or across, or by the side or sides of the said road. And after directing the amount of the tolls, and the time of payment, and limiting the number of tolls to be taken on each day, the act contains a section declaring certain exemptions from toll, as carriages conveying materials, the king's mails, his majesty's troops, persons going to places

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of worship or attending funerals, &c.; and at the close of that section is the following proviso, "Provided always, that no tolls shall be demanded or taken for any horse, cattle, or other beasts which shall not go or pass more than one hundred yards on the said road."

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In pursuance of the powers of the above act, the trustees continued a toll-gate previously erected at the *Five Ways*, in the parish of *Edgbaston*, and within about two yards of the boundary line between that parish and the town of *Birmingham*; and until the passing of the act next hereinafter mentioned they repaired the turnpike road, not only from *Blakedown Pool* to the said gate at the *Five Ways*, but also from the said gate to *Easy Row*, in the town of *Birmingham*, one of the *termini* of the said road. The road between the said gate and *Easy Row* is about three-quarters of a mile long. By an act of 9 Geo. 4, intituled "An Act for better paving, lighting, watching, cleansing, and otherwise improving the town of *Birmingham*, in the county of *Warwick*, and for regulating the police and markets of the said town," after repealing a prior act for the same purposes, certain persons therein named are appointed commissioners for paving and repairing the highways of *Birmingham*, and for the other purposes mentioned in the title of the act; and they are authorized and directed to raise money to carry the act into execution by rates and assessments on the inhabitants of the town. By this act it is enacted, that it should not be lawful for the trustees of any turnpike road to repair any part of such road which should lie or be situate within the town of *Birmingham*, but so much and such part of every turnpike road as should be situate within the said town should from thenceforth be made and maintained by the said commissioners thereby appointed. Since the passing of the last-mentioned act, the trustees of the *Hagley* turnpike road, appointed under the said act of 58 Geo. 3, have ceased to repair the road between the *Five Ways* and *Easy*

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*Row* (being as above mentioned about three-quarters of a mile long), because it is in the town of *Birmingham*. The commissioners of the *Birmingham Street* act, 9 Geo. 4, above mentioned, have repaired and do now repair the said road up to the *Five Ways*, and to within about two yards of the said turnpike-gate. At the time of passing the said last-mentioned act, the tolls of the said turnpike road, including the part in question, had been and then were leased out by the said trustees; and the monies which had been borrowed or become due and owing on the credit of the said tolls, as well those which became due and owing under the present turnpike act, as those for the repayment of which the new tolls granted by the said act (58 Geo. 3) were made subject and liable, were not, nor are they yet paid off. The sum of 7000*l.* was then and still is due on the credit of the tolls. Part of the said 7000*l.* was expended in the purchase of land which was wanted and used for the purpose of widening that part of the said road which lies within the limits of the town of *Birmingham*; and the trustees are now further liable to the annual payment of 11*l.* 16*s.* 3*d.*, which sum was awarded to be paid annually by the said trustees to one *Robert Samuel Skey* or his representatives during the continuance of a certain building lease then held by the said *Robert Samuel Skey*, as a compensation for his interest as lessee in certain building land also required and taken for widening the same part of the road between the *Five Ways* gate and *Easy Row*. If the tolls now paid at the *Five Ways* toll-gate, by persons claiming exemption under the said act of 9 Geo. 4 were taken away, the tolls received on the said turnpike road would be materially diminished, and the securities of persons to whom money is owing on the credit of the said tolls would be proportionably affected. The plaintiff is owner and occupier of mills and other premises in *Birmingham*, and as such is assessed to the paving rate made in pursuance of the statute 9 Geo. 4, which forms the fund out of

which the highways in the town and parish of *Birmingham* are now repaired. He resides in the parish of *Edgbaston*, and pays rates for the repair of the highways in that parish. On the occasion in question, he was travelling in his carriage drawn by two horses from his place of residence to his mills. In so doing he came along a road (not a turnpike road), in the parish of *Edgbaston*, and entered the *Hagley* turnpike road about thirty yards from the said turnpike-gate at the *Five Ways*. He passed over the said thirty yards of road to and through the said gate, and then entered upon the said road leading from the gate to *Easy Row*, which was heretofore repaired by the trustees of the *Hagley Road* act, but now by the commissioners of the *Birmingham Street* act, so that he passed over more than one hundred yards of the said turnpike road, taking into consideration that part of it which is now repaired by the *Birmingham* commissioners, but over less than one hundred yards of that part which is now repaired out of the turnpike trust fund. The question for the consideration of the Court is, whether the said toll so paid by the plaintiff was legally demandable; if the Court should be of opinion that it was not, then the verdict to be entered for the plaintiff; but if the Court should be of opinion that it was, then the verdict to be entered for the defendant.

*Hill*, for the plaintiff.—Toll is no longer payable for passing over that portion of the road which by the act of 9 *Geo. 4.*, (the *Birmingham Improvement Act*), is withdrawn from the operation of the statute of 58 *Geo. 3.* The latter act included the whole road from *Blakedown Pool* to *Easy Row*, in the parish of *Birmingham*; and the object of the act is stated to be the more effectually repairing, widening, altering, improving, and keeping in repair that road. By the *Birmingham Improvement Act*,

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such part of every turnpike road as shall be situate within the town of *Birmingham* shall be thenceforth made and maintained by the commissioners appointed under that act; but this statute does not simply transfer the burthen of repairing this portion of the road to the commissioners, it goes further, and enacts that it shall not be lawful for the trustees of any turnpike road to repair any part of such roads as lie or be situate within the town of *Birmingham*. The latter provision distinguishes this case from *Bussey v. Storey* (a) and *Pope v. Langworthy* (b). In the former of those cases it was urged that the toll ought not to be demanded by the trustees of the road for passing over a portion of the road (adjacent to a bridge which was repaired by the county), and that they would violate their duty in making such repairs themselves. Upon this objection *Parke*, J., observed, "It is true they are not likely to be called upon to do so, because the county is in general provided with an ample fund to fulfil its obligations to repair completely and effectually; but if the reverse should happen to be the case, and the public exigency should require it, we do not know that the trustees might not expend money in repairing this part of the road." In this case the trustees are absolutely forbidden to do so; and then the question arises whether, where it is impossible that the tolls can be applied in forwarding the objects for which they were originally imposed, they shall still continue to be paid. It is one of the highest and most firmly established principles of the *English* law, that, to impose a burthen upon the public, clear and unambiguous language must be used (c). [*Parke*, B.—There is no doubt with regard to that prin-

(a) 4 B. & Adol. 98; 1 Nev. & Man. 639, S. C.

(b) 5 B. & Adol. 464; 1 Nev. & M. 647, S. C.

(c) See *Leeds and Liverpool Canal Comp. v. Hustler*, 1 B. & C. 424; 2 D. & R. 556.

ciple. In this case the toll is imposed upon the public in clear and unambiguous language by the act of the 58 Geo. 3.] The words of that act are unambiguous; but the doubt arises upon the operation of the subsequent statute. The legislature in imposing the toll, in this as in other cases, upon creating the burthen, has given a corresponding benefit. In consideration of the tolls paid, the public had a right to have the road maintained and repaired; and when the trustees were relieved from the obligation to repair, it cannot be supposed that it was intended they should retain the tolls which were only a compensation for repairs. The trustees were bound to repair the whole line of road between *Blackdown Pool* and *Easy Row*, and the tolls were exactly commensurate with the extent of that road; but if the construction of the acts contended for by the defendant be correct, they will be entitled to the whole tolls for the repair of a part only, and the public will have to pay twice over for the repairs of that portion of the road which is within the town of *Birmingham*. [Alderson, B.—If a road lead to a ford, and again from the ford on the other side, and the county build a bridge, and the road on each side of the bridge is repaired by the county, would those portions cease to form part of the road for the purposes of toll?] In that case the trustees might, if they should think fit, repair the portions adjoining the bridge; here they are prohibited from repairing the portion of the road within the town. [Parke, B.—The question is, what is the effect of the new act, whether it withdraws the part of the road which is in *Birmingham* altogether from the jurisdiction of the trustees, or whether it merely exonerates them from making repairs? Alderson, B.—If the effect of the last act be to render the part in question no longer parcel of the old road, then the plaintiff did not go over one hundred yards of the old road.] Turnpike tolls are in the nature of toll thorough at common law, which is by prescription, and requires a consi-

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*Esch. of Pleas,* deration. There the burthen and the benefit are co-equal.  
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Applying that principle to the present case, it is clear that the trustees cannot claim toll over this portion of the road. [Alderson, B.—The question is, whether you travelled one hundred yards on the *said* road. Bolland, B.—It must be recollected that the trustees of this road were loaded with a very heavy debt. Parke, B.—That is a strong argument to shew that the legislature did not intend to withdraw this portion of the road from the old road.] The legislature could not intend that the public should be doubly charged.

*Guest*, for the defendant.—It is said that the principle upon which tolls are imposed is, that they are the consideration for maintaining and repairing the road. That is not correct. Tolls are merely an auxiliary fund. The repairs are originally an obligation upon the districts in which the roads lie. “It is,” says Parke, J., “their share of the public burthen which those districts have to pay, and which is imposed for the general benefit of the community; and tolls are an additional tax for the same purpose” (a). The object of tolls is rather the improvement and alteration of roads than their repair. They are intended likewise as a security to those persons who have lent money to the trustees; and, in the present case, securities to the amount of upwards of 7000*l.* have been given; and it is distinctly stated in the special case, that, if this portion of the road is to be exempted, the tolls will be materially diminished, and the securities of the creditors proportionably affected. Then it is urged that the subject will be doubly taxed, but this objection would apply to all cases; and if a parish, or township, or individual, were bound to repair any part of a road, such portion

(a) *Bussey v. Storey*, 1 Nev. & Man. 596. *ants of Leake*, 2 Nev. & Man. 596. Man. 645; and see *R. v. Inhabit-* (b) 3 Geo. 4, c. 126, s. 110.

would not, for the purposes of toll, be within the jurisdiction of the trustees. It is possible, that, under the provisions of the General Turnpike Act (*a*), the whole burthen of the repairs might be cast upon the parish; and yet can it be contended that the tolls would wholly cease? In the same way it may be said, that the inhabitants of every parish in which statute labour is performed are doubly taxed. The act of the 9 Geo. 4 was not passed with reference to the 58 Geo. 3; nor was it intended to affect the rights of the trustees under the 58 Geo. 3, or of the persons claiming under them, who were no parties to it. The inhabitants of *Birmingham*, in procuring the Improvement Act, assumed the burthen of it themselves, and cannot complain of the hardship. It is clear, that it never could have been the intention of the Legislature to deprive the parties who had advanced money, upon the security of the whole tolls of the turnpike roads, of any part of their security. The power of granting such securities was given by the 9 Geo. 4, and, at the time of the passing of that act, tolls were actually leased. The rights of the lessees also would thus be affected; and they would be liable to an action at the suit of every person from whom they demanded and obtained the toll, abolished by an act of Parliament of which they had never heard. If the Legislature had intended to repeal *pro tanto* the 58 Geo. 3, it would have done so in clear and unambiguous language, and would not have left that repeal to be gathered from an obscure clause in a local act of Parliament. It is a general rule, that the Legislature is careful in repealing its own acts. The maxim, *leges posteriores priores abrogant*, is never met with in the books without a caution as to its application. When mentioned by *Viner* (*b*), there is appended this note—" This is a true rule; but repeals by implication are things disfavoured by the law, never allowed of but where

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(*a*) 3 Geo. 4, c. 120.

(*b*) Vin. Abr. Statutes, 132.

*Eccles. of Pleas,* the repugnancy is plain and unavoidable; for these repeals  
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 carry along with them a tacit reflection upon the legislators, that they should ignorantly and without knowing it make one act repugnant to and inconsistent with another." Here there is no repugnancy. Certain rights given to the trustees are taken away in order to accommodate the town commissioners. This cannot affect their remaining rights.

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PARKE, B. (a).—I am of opinion that the defendant in this case is entitled to judgment. This is an action brought by the plaintiff to recover money paid by him under a species of duress for toll; and the question is, whether he is bound to pay such toll or not. The toll, in my opinion, was payable. The first statute, upon the construction of which this question arises, is that of the 58 Geo. 3, which, after repealing certain former acts, consolidates their provisions, and imposes tolls as an auxiliary fund for keeping the road in repair. The tolls under that act are imposed in clear and unambiguous language; and there is no doubt that the plaintiff was, when that act was passed, bound to pay those tolls, in travelling along that road, none of the exemptions being applicable to him. The whole question arises upon the effect of the subsequent act, the 9 Geo. 4, for the improvement of the town of Birmingham. That statute also repeals several older acts, and re-enacts their provisions. The 33rd section provides "that it shall not be lawful for the trustees of any turnpike road to repair any part of such road which shall be or be situated within the said town of Birmingham; but so much and such part of every turnpike road as shall be situate within the said town shall be from thenceforth made and maintained by the said commissioners." The question is, whether the effect of this clause is merely to impose the liability of repairing this portion of the road upon the com-

(a) Lord Lyndhurst was sitting in equity.

missioners under the *Birmingham* Improvement Act, or whether it is also to take it out of the jurisdiction of the trustees of the turnpike road. The latter is the proposition which it is necessary for the plaintiff to establish. Looking at the context of the act, it does not appear to have been the intention of the Legislature to withdraw this part of the road from the jurisdiction of the trustees, except for the single purpose of repairs. By previous sections of the Improvement Act, the commissioners are authorized to pave the several streets within the town of *Birmingham*, and to make footways; and it is obvious, that, in prohibiting the trustees of the turnpike road from interfering in the repairs of any streets within the town, the object of the Legislature was to prevent the uniformity of any plan which might be adopted by the commissioners for paving the streets of *Birmingham* from being broken in upon. The intention of the prohibitory clause was simply to prevent the two classes of persons, the trustees and the commissioners, from interfering with one another. Any other construction than this would work a serious injury to those persons who have advanced money on the security of the tolls. The case precisely resembles that of *Pope v. Langworthy*; and upon the authority of that case, and of *Bussey v. Storey*, and for the reasons I have given, I am of opinion that the defendant is entitled to judgment.

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BOLLAND, B.—I might perhaps have been content with expressing my concurrence in the judgment just delivered by my Brother Parke; but, as this is a case of some importance to the public, I will state shortly the grounds of my opinion. The plaintiff has shewn no title to recover the money paid by him as toll. The act of the 9 Geo. 4 in precise terms does not touch the question of tolls; but looking at that act, and seeing the advantage which the town of *Birmingham* receives from having the

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streets and footpaths there repaired and maintained according to one uniform system, and under one body of managers, there is fully sufficient to explain the meaning of the Legislature in prohibiting the interference of the turnpike trustees. Nor is it at all inconsistent with the provision made for this particular object, that the tolls imposed by the 58 Geo. 3 should continue to be paid. The trustees under that act have gone to great expense, and incurred a debt of upwards of 7000*l.* in repairing the road, and a part of this sum has been expended in improving the very portion of the road in question. For these tolls, therefore, the inhabitants of *Birmingham* and the public at large have received an equivalent. There is nothing unreasonable in the limited power given by the Improvement Act to the commissioners, and nothing to take away the title of the trustees of the turnpike road to the tolls.

ALDERSON, B.—I also am of the same opinion; and I think that the limited construction which has been put upon the 33rd section of the *Birmingham* Improvement Act is correct. Under the 58 Geo. 3, the toll was clearly payable by the plaintiff; it was a tax imposed in distinct and unambiguous language. Under that act, the part of the road which lies within the town of *Birmingham* was for all purposes a part of the *Hagley* turnpike road. The question is, whether there is any thing in the subsequent act to interfere with the payment of the tax thus clearly and distinctly imposed upon the public. The exemption now claimed is not on behalf of the people of *Birmingham*, but of the public at large; and is there any thing in the act of 9 Geo. 4 to shew that the Legislature intended to exempt the public at large from the payment of these tolls? No reason can be alleged for such an exemption, nor does the Legislature appear to have had it in contemplation. On the other hand, is there not an obvious and distinct

object in the clause which has given rise to the present question? The Legislature deprived the trustees of the turnpike road of their jurisdiction over the portion which lies within the town, in order that there might not be two clashing jurisdictions. That is the reason of the prohibition; and it is quite consistent with that reason that the tolls should continue to be paid. The present case falls precisely within the principle of the two decisions which have been cited, of *Bussey v. Storey* and *Pope v. Langworthy*, which shew that a mere exoneration of the trustees from repairing a portion of the road will not prevent that portion from still being considered, for the purposes of toll, a part of the road. The 133rd section of the Improvement Act being explained, the case falls in all respects within the authority of the cases cited.

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**GURNEY, B.**—I am of the same opinion. If it had been the intention of the Legislature that the act of 9 Geo. 4 should withdraw that portion of the road, which is within the town of *Birmingham*, altogether from the operation of the former statute, and render it for the future no part whatever of the turnpike road, that intention would certainly have been expressed, and would not have been left to be inferred from the subsequent statute. To any such inference a full answer is afforded by a consideration of the injury which such a construction would work to those who have advanced money on the credit of the turnpike tolls. There must, therefore, be—

Judgment for the defendant.

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BRADEBURY and Others, Assignees of PEERS LEATHER,  
a Bankrupt, v. ANDERTON.

*A.* and *B.*, creditors of a trader, who had committed a secret act of bankruptcy, pressed him for payment, when he offered goods, if a customer could be found. The creditors procured the defendant, to whom they were indebted, to purchase the goods, who with the assent of the trader credited *A.* and *B.* in account. In *assumpsit* by the assignees of the trader for the price of these goods, it was held, that, if the appropriation of the money to *A.* and *B.* was merely in consequence of the direction of the trader, it was revocable, and the plaintiffs might recover; but if it was part of the contract that the payment should not be revocable, it was then a question whether this was a payment within the 6 Geo. 4, c. 16, s. 82, which, *semel*, it was not.

**A**SUMPSIT in one set of counts by the plaintiffs, as assignees, upon causes of action accruing before the bankruptcy of *Leather*, viz. for goods sold and delivered, for work and labour, for money paid, money lent, and money had and received, for interest, and upon an account stated. Breach—Non-payment to the bankrupt before his bankruptcy, and to the assignees since. In another set of counts the plaintiffs claimed for goods sold and delivered by them as assignees, for interest due to them, and on an account stated with them. Plea—the general issue, with a notice to dispute the trading, the petitioning creditor's debt, and the act of bankruptcy. On the trial, before *Gurney*, *B.*, at the last Assizes for the county of *Lancaster*, the following appeared to be the facts of the case :—

The bankrupt before his bankruptcy was a dealer in fustians, at *Newton*, in *Lancashire*, and, in the month of December, 1833, was indebted to certain persons named *Moss* and *Haward* in the sum of 110*l.* 12*s.* On the 12th of that month, *Leather's* affairs being embarrassed, the son of *Moss*, by his father's directions, called upon him and pressed for payment of that sum, due to his father and *Haward*; *Leather* replied that he had no money, but that if he could get a customer for his goods they should be paid. *Moss* and *Haward* accordingly procured the defendant, who was a creditor of theirs, to purchase, on the 14th December, goods from *Leather* to the amount of 131*l.* 12*s.* 9*d.*, and these goods were delivered to the defendant on the 16th. The son of *Moss* saw *Leather* again on the 17th, communicated to him the arrangement between *Moss* and *Haward* and the defendant, and inquired whether he had settled with the defendant. A receipt was given on the 18th by *Haward* to *Leather*, in

which *Haward* acknowledged the receipt of the money from the defendant, agreeably to the order of *Leather*; but in fact no money passed from the defendant to *Moss* and *Haward*, but credit was given to them in account. The act of bankruptcy took place on the 30th November, and the fiat issued on the 21st December. For the defendant it was contended, that, if this was a fraudulent preference, trover was the proper remedy; but that if the assignees affirmed the contract, the defendant was discharged by the payment to *Moss* and *Haward*. The objections were, however, overruled by the learned Judge, and the plaintiffs had a verdict. *Blackburne* having obtained a rule to shew cause why the verdict for the plaintiffs should not be set aside, and a new trial had—

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*Pollock* and *Alexander* shewed cause.—This action is maintainable, if not by the assignees in their representative capacity, yet certainly in their own right. The assignees are entitled to adopt and to sue upon the contract made by the bankrupt. The goods were sold by *Leather* to the defendant, and the latter was to pay the price of them to *Moss* and *Haward*; and he neglected to do so; upon which *Leather* himself might have sued as for goods sold and delivered, had he not become bankrupt, and the plaintiffs may now sue as representing him. The passing the money in account by the defendant to the credit of *Moss* and *Haward* was not equivalent to a payment by him to them. *Cox v. Prentice* (a). The whole transaction was a mere juggle, and upon that the verdict of the jury proceeded. It was competent to *Leather*, at any time before his bankruptcy, to revoke the order for the payment of the money to *Moss* and *Haward*, for the order had never been acted upon, and the assignees after the bankruptcy had the same power of revocation. If a trader sells goods to

(a) 3 Maule & S. 344.

*Exch. of Pleas,* A., directing him to pay the price to B., a creditor of him  
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(the trader), and, before the money is paid, an act of bankruptcy intervenes, and the title of the assignees accrues, can it be contended that they would not have a right to stop the payment of the money? Might they not say to the purchaser, you shall not pay B.; we revoke the authority given to you to pay him, and we claim payment to ourselves. The doctrine of revocation, as applied to the payment of money, was discussed in a case which occurred in the *Common Pleas* (a), in which it was held, that, where a customer gave an order to his bankers, directing them to hold a sum of money at the disposal of T. S., such a direction might be revoked before payment made by the bankers in pursuance of it. It may be said, on the other side, that *Moss* and *Haward* might have sued the defendant for the money due for the price of the goods, but that is not so (b); the contract to pay *Moss* and *Haward* was made by the defendant with *Leather*, and not with them; and, on his neglecting or refusing to pay them, an implied contract arose to pay for the goods in the ordinary way, namely, to pay the value of them to the vendor. But it is urged that this transaction is alleged by the plaintiffs to be founded in fraud, and that, therefore, they ought to have treated the whole contract as void, and ought to have brought trover. It was, however, quite competent to them to waive the tort, and to bring *assumpsit* for the goods sold and delivered; and it is no answer to say, that, by so doing, they affirm the contract with all its consequences. Let it be so; the contract was to pay *Moss* and *Haward*, and it has not been performed. The assignees affirm it, sue upon it, and rely upon that non-performance. It amounts, in fact, to the common case of goods sold by the bankrupt

(b) *Gibson v. Minet*, 2 Bingh. 7; 582; *Yates v. Bell*, 3 B. & A. 643; *Ry. & Moo. N. P. C.* 68, S. C. *Bailey v. Culverwell*, 8 B. & C.

(b) See *Scott v. Porcher*, 3 Mer. 652; *Williams v. Everett*, 14 East, 448.

and not paid for. The case of *Bellon v. Hyde* (*a*) was cited at the trial. There Lord *Hardwicke* said, that it appeared to be new to him to permit assignees to maintain an action of *indebitatus assumpsit* for money paid by the bankrupt to another person after a secret act of bankruptcy, and that he had always thought that in such cases assignees were obliged to bring an action of tort; and *Holt*, C. J., *Parker*, and *Raymond*, are said to have expressed the same opinion. This case, however, has been overruled by *Hitchin v. Campbell* (*b*), and now an action of contract is the usual remedy, the only distinction being, that, if the party be sued in *assumpsit*, he may set off any debt due from the bankrupt to himself. *Smith v. Hodgson* (*c*). In *Poland v. Glyn* (*d*), which was an action for money had and received, brought by the assignees of a bankrupt to recover a sum of money paid by the bankrupt before his bankruptcy to a creditor by way of fraudulent preference, it was objected that the form of action was misconceived; but the objection was overruled. [Parke, B.—That assignees cannot sue in *assumpsit* upon a contract made by the bankrupt, without adopting the same contract with all its consequences, appears from the case of *Ferguson v. Carrington* (*e*). There the vendor of goods, which had been sold upon credit, brought *assumpsit* before the time of credit had expired, on the ground that the goods had been fraudulently obtained; but the Court held, that, though trover might have been brought, *assumpsit* was not maintainable.] The plaintiffs there proceeded upon an implied contract when there was an express contract between the parties. Here the assignees adopt the very same contract which the bankrupt

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(*a*) 1 Atk. 126.

& R. 47, S. C.

(*b*) 2 W. Bl. 827; 3 Wilts. 308,  
S. C.

(*d*) 2 D. & Ry. 310; 4 Bingh.  
22, n., S. C.

(*c*) 4 T. R. 211. See *Kinder*  
*v. Butterworth*, 6 B. & C. 48; 9 D.

(*e*) 9 B. & C. 59; 3 C. & P.  
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made. The authority of *Ferguson v. Carrington*, also, has been canvassed; and it is opposed to the case of *De Symons v. Minchwoich* (a). [Parke, B.—That case has been overruled, and the principle is well established, that, where there is an express contract between two parties, the law will not imply another.] If the assignees should be held not to be entitled to recover in their representative capacity upon the contract made by the bankrupt, they may, at all events, maintain an action in their own right, and recover upon the counts in the declaration adapted to that title. Supposing the whole transaction fraudulent, they may waive the fraud, treat the bankrupt as their agent for the delivery of the goods, and recover for the value of those goods delivered to the defendant. Although the bankrupt himself, being a party to the fraudulent contract, might be precluded from claiming under any implied contract, yet the same rule does not apply to his assignees; they are clothed with all his rights, but they are not subject to all his liabilities. They are not estopped by matters which would stop him; they may disaffirm contracts by which he would be bound; they may maintain actions which could not be maintained by him (b). If this be a fraud, the circumstances of the bankrupt himself having been a party to it, will not preclude the assignees from setting up the fraud, and averring that no property passed, or from waiving the fraud, and claiming upon an implied contract of sale. A case of this kind occurred before Gibbs, C. J.; it was a contrivance to get a bad debt paid; a third party came and selected goods from the trader's stock. There the assignees proved that the defendant selected the goods, consulted about the prices, and directed where they were to be sent; and it appeared that they were delivered at the defendant's place of business. [Parke, B.—The case to which you refer is

(a) 1 Esp. 430.

(b) See *Poland v. Glynn*, 2 D. & R. 315.

probably that of *Abbotts v. Barry* (a). The ground of decision in that case was, that the defendant, having procured the goods to be sold to an insolvent for the purpose of getting possession of them himself, the Court would presume a contract on his part to pay for them, the original contract being void on the ground of fraud.] That is precisely the case here. [*Parke*, B.—In the case cited, the parties to the implied contract were not the same as the parties to the original contract.] Nor are they here. The assignees were no parties to the original contract, which was between the bankrupt and the defendant. Upon both points, therefore, the plaintiffs are entitled to recover. They may either adopt the contract of the bankrupt, and treat it as unperformed on the part of the defendant; or they may disaffirm it for the fraud, and, waiving the tort, may recover in *assumpsit* in their own right, upon the implied contract by the defendant to pay for the goods, which, being their property, have been delivered to, but not paid for by him.

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*Blackburne and Starkie, contrâ.*—The first question is, whether any contract exists upon which the plaintiffs, either as assignees or in their own right, are entitled to sue; and no such contract does exist. Taking the contract actually made between *Leather* and the defendant, that contract has been performed. There has never been any breach of it, and no cause of action upon it has ever vested in the plaintiffs. The contract was, that the price should be paid to *Moss and Haward*; and the giving credit for it on account was equivalent to payment. The case of *Cox v. Prentice* is not an authority, for there the situation of the parties had not been changed; but here it has been changed in consequence of the bankruptcy of *Leather*. [*Alderson*, B.—That certainly distinguishes the present case

*Exch. of Pleas,* from *Cox v. Prentice.*] If the assignees cannot proceed upon the express contract, is there any implied contract which gives them a right to sue? The authorities are numerous and strong to shew that no such contract can be implied. The general rule is, that where there is an express contract no other contract shall be implied; and if none can be implied for the benefit of the bankrupt himself, neither can it for the benefit of his assignees who represent him, and are limited to the same rights as himself. The opinion of Lord *Hardwicke*, in *Bellon v. Hyde*, has already been cited. In *Smith v. Hodson*, Lord *Kenyon* says, "The assignees, by bringing the action on the contract, recognised the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been; and if he had brought the action the whole account must have been settled, and the defendant would have had a right to set off the amount of the bill. Therefore, on the distinction between the actions of trover and *assumpsit*, we are all of opinion that judgment of nonsuit must be entered." *Smith v. Hodson* has been followed by *Ferguson v. Carrington*, and by *Strutt v. Smith* (*a*), lately decided in this Court. These decisions shew that the plaintiffs cannot proceed upon an implied contract. But it is said that the whole transaction was fraudulent, and that the actual contract thus being shewn to be void, an implied contract arises. What is there, however, to shew fraud in this case? Undoubtedly there was no moral fraud; and there is nothing in the law which prohibits a creditor from pressing for and obtaining payment of his just debt. Then, without reference to the contract, the payment in question is protected by the 82nd section of the 6 Geo. 4, c. 16, which enacts "that all payments really and *bond fide* made to any bankrupt before

(*a*) 1 C. M. & R. 312. See *Bingh. N. C.* 306; *Buchanan v. Thorpe*, 3 B. & *Findlay*, 9 B. & C. 738.  
Ad. 580; *Sims v. Simpson*, 1

the date and issuing of the commission against such bankrupt shall be valid, notwithstanding any prior act of bankruptcy (a)." [Parke, B.—Had it not been part of the original contract that the price of the goods should be paid to *Moss* and *Haward*, a jury would scarcely be induced to find that this was a *bond fide* payment.] If the plaintiffs have any right to recover, it is in an action of tort; and it is most important that the forms of action should be preserved.

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PARKE, B.—I am of opinion that the rule for a new trial must be made absolute. This is an action brought by the assignees of a bankrupt for the price of goods sold and delivered by the bankrupt to the defendant. It appears upon the evidence, that the bankrupt had some communication with *Moss* and *Haward* on the subject of the sale; and it was important that the opinion of the jury should have been taken with regard to the nature of that communication. It is alleged that there was a mutual agreement between the bankrupt and the defendant; and that it was part of that agreement that the price of the goods should be paid by the defendant to *Moss* and *Haward*, who were by the contract to have an irrevocable right to the money. For the plaintiffs it is contended, that this was no more than an ordinary sale, with a mere direction to pay over the money to *Moss* and *Haward*. If that were the case, the direction might have been at any time revoked by the bankrupt, before the payment of the money over according to the order; and if the money was not paid over, the assignees had a right to adopt the contract and sue upon it. On the other hand, they were entitled to avoid it by treating it as a disposition of their property by the bankrupt, in which case they might maintain an action of trover. But if the other was the real contract,

(a) See *Cash v. Young*, 2 B. & C. 413; 3 D. & Ry. 652. *Hill v. Farneill*, 9 B. & C. 45.

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and the money was not to be paid to the bankrupt, but the appropriation of it to *Moss* and *Howard* was by the contract irrevocable, then, if the assignees adopted that contract, they must be taken to have adopted it throughout, and this form of action is misconceived. If the contract was as alleged by the plaintiffs, an ordinary contract of sale with a direction only as to payment, the question then arises whether it was a good payment to the bankrupt within the 82nd section of the 6 Geo. 4, c. 16. If the payment was effected by the settlement in accounts three days after the sale, it is not very probable that a jury would find it to be a payment *bond fide*, and in the ordinary course of dealing. The whole of the case, then, turns upon this, what was the real nature of the contract made by the bankrupt? If it was merely an order by him upon the defendant to pay *Moss* and *Howard*, then such order was countermandable by him or by the plaintiffs, and they are entitled to recover; but if, on the contrary, it gave an irrevocable interest to *Moss* and *Howard*, then the action is not maintainable, and the defendant has a good defence in this form of action. The evidence upon these points is very doubtful, and the case must therefore be again submitted to a jury.

**BOLLAND, B.**—The question is, what was the contract, and that question must be decided by a jury.

**ALDERSON, B.**—If the contract was, that the application of the money should be irrevocable, then the plaintiffs, adopting the contract, adopt it throughout, and cannot sue the defendant in this form of action. If the application was not irrevocable, but a mere direction, then the question arises whether the circumstances shew a good payment under the 82nd section of the Bankrupt Act, 6 Geo. 4. A jury would probably find against its being such a payment.

**GURNEY, B.**—There is another view in which this action may be regarded. Application is made by *Moss* and *Haward* to the bankrupt for payment. They find he has no money, and then they resort to a contrivance for the purpose of getting possession of his goods. Is not this a fraud upon the bankrupt laws for the purpose of obtaining a preference?

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Rule absolute.

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### TALBOT v. LEWIS.

**TRESPASS** for breaking and entering the close of the plaintiffs, and digging for and carrying away certain dollars. *Pleas*—*first*, negativing the title of the plaintiff to the close; *second*, negativing his title to the dollars. At the trial, before *Parke*, B., at the last *Summer Assizes* for the county of *Glamorgan*, it appeared that the plaintiff was lord of the manor of *Landymere*, in *Glamorganshire*, which he claimed as mesne lord, under the Duke of *Beaufort*, who possessed certain royalties there, as lord paramount of the honor of *Gower*. As lord of the manor of *Landymere*, the plaintiff claimed by prescription a right to all wrecks of the sea happening upon *Rossilly Sands*, allowed to be within the boundaries of the manor. In order to establish this right, the plaintiff tendered in evidence, from amongst his own muniments, a document, dated in the year 1639, purporting to be the answer of certain persons, some of whom were tenants of the manor, to commissioners appointed by the Earl of *Pembroke*, then lord of the manor, wherein the limits of the manor were set forth; this answer having been read, the following answer to the 9th article proposed by the commissioners was tendered in evidence. “To the 9th article we say, that all wayfes, estrayes, wrecke of sea, and fealons goods, treasure-trove, or such like, within the precincts of this

In trespass by the lord of a manor for wreck, a document, dated in 1639, was offered in evidence, purporting to be the answer of certain persons, tenants of the manor, to a commission, issued by the lord of the manor for surveying the same, in which document it was stated that the lord was entitled to wreck:—  
*Held*, that this evidence was inadmissible, the title of the lord not being a matter of public concern, and the jurors having no peculiar means of knowledge.

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manor, doth belong to the lord of this manor, and how the law hath heretofore been answered thereon we know not." The learned Judge admitted the former evidence for the purpose of proving the boundaries; but rejected the answer to the 9th article, as inadmissible for the purpose of proving the right of the lord to wreck. A verdict having been found for the defendant—

*Wilson* now moved for a new trial on the ground—*first*, that the evidence in support of the claim to the wreck was improperly rejected; and, *secondly*, on the ground that the verdict was against the weight of evidence. Where the subject matter to be proved is a matter of a public nature, evidence of general reputation is admissible; and the declarations of every person, in such a situation as to possess competent means of information, may be received. The sea and all navigable rivers are public highways, and any person using the *Bristol Channel* may be supposed cognizant of the title to wreck upon its shores. So, persons living along the coast, and in the neighbourhood of this manor, must have enjoyed opportunities of obtaining information upon that fact, which would entitle their evidence to credit. An argument in favour of the reception of the evidence may be drawn from the statute 3 Ed. I, c. 4, concerning wrecks, which enacts that "goods shall be saved and kept by view of the sheriff, and by view of such as are of the town where the goods were found." Thus the inhabitants of the town, no doubt, upon the principle now contended for, were constituted a sort of jury for the purpose of ascertaining the question of wreck or not—the very point to which the document in question goes. The persons making answer are called in the document *jurors*; and many of them who signed it were inhabitants of the place in question. The extent of their local information appears from the circumstance of their being summoned to answer under this commission;

and it is submitted, that their answer to the 9th article ought to have been received, upon the same principle as their answers with regard to the extent of the manor, viz. that it was a matter of public concern, upon which they possessed competent means of knowledge, and which they had no interest to misrepresent.

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**Lord LYNDHURST, C. B.**—The plaintiff in this case claims the wreck as lord of the manor, and he may entitle himself to it either by grant or by prescription, which supposes a grant. But the right is a private right, with which neither the tenants of the manor nor the inhabitants of the town have any concern. Those persons cannot be presumed to be better acquainted with it than any other of the King's subjects. I therefore think that the presentment, or answer of the jurors, was not evidence to prove such right.

**PARKE, B.**—I rejected the evidence, because, as it was not possible that the wreck could belong to the tenants of the manor or the inhabitants of the town, their declarations could have no more weight than those of any other persons.

**ALDERSON, B.**—I am of opinion that the evidence was rightly rejected. Is evidence of this kind sufficient to deprive the Crown of its rights, the King being *prima facie* entitled to all wrecks of the sea? Here, however, it is quite clear that it was not admissible, for the parties making the declarations possessed no peculiar means of knowledge.

**GURNEY, B.**, concurred.

Rule refused upon the first point, but granted on the second.

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CHARLESWORTH v. RUDGARD.

By a local act for paving, watching, lighting, and improving the city of *L.*, commissioners were appointed for carrying the act into effect, and a penalty was imposed upon such of them, as, being personally interested in the matter in question, should act as commissioners in the execution of the act. One of the commissioners, being personally interested in the construction of a footpath opposite his own house, attended a meeting of the commissioners, and spoke upon the question of the mode of constructing such footpath:—  
*Held*, that this was evidence to go to the jury of an acting as a commissioner.

**D**EBT upon the stat. 9 Geo. 4, cap. xxvii.—The declaration stated, that heretofore, and before, and at the times when the defendant acted as a commissioner as hereinafter mentioned, in the city of *Lincoln*, and county of the same city, the defendant was a commissioner for carrying into execution the act hereinafter mentioned. That heretofore, to wit, on the 24th *July*, 1833, in the city &c., at a meeting of commissioners for carrying into execution an act of Parliament passed 9 Geo. 4, and intituled “An act for paving, lighting, watching, and improving the city of *Lincoln*, and the bail and close of *Lincoln*, in the county of *Lincoln*, and for regulating the police therein,” then and there held at the *Guildhall* in the city of *Lincoln*, it was then and there ordered, by the commissioners attending the said meeting, that a footpath of flag stones, of two flags of four feet in width, with a four-inch kerb on the outer edge, be made in front of the buildings, yards, and premises, along the whole line of wharfs or roads, on the east and north sides of *Brayford*, with mount-sorrel crossings, of the same width, to the gateways, lanes, and openings, and that the necessary notices be given to the occupiers. And the plaintiff avers, that, at the time of making the last-mentioned order, and from thence until and at the time of the defendant’s acting as a commissioner as hereinafter mentioned, he the defendant was the occupier of certain premises, that is to say, certain yards and buildings on the north side of *Brayford*, and then and there being within the jurisdiction of the said act, and lying before and adjoining the said line in the said order mentioned, the same line being then and there a public place, also within the jurisdiction of the said act; and, as the occupier of such premises, he the defendant was, during all the time last aforesaid, one of the occupiers in the said order mentioned, subject, accord-

ing to the said act, to make part of the said footpath, and also one of the occupiers mentioned in the proposal hereinafter mentioned to have been made for the alteration of the said order. That afterwards, to wit, on the 26th October, 1833, in &c., at a special meeting of the said commissioners then and there held, it was proposed that the said order made at the said meeting, held on the 24th day of July, &c., should be altered to the following effect, namely, "that the occupiers of buildings, yards, and premises, along the whole lines of wharfs or roads on the east and north sides of *Brayford*, be ordered to make footpaths the whole length of their respective frontages with small stones and gravel, with a four-inch kerb, and that the making of footpaths in that manner, with moundsorrel crossings, should be deemed a compliance with the said order." And at the last-mentioned meeting, so held as last aforesaid, it was also then and there proposed, that the said original order be acted upon and put into execution. And the plaintiff further saith, that the said footpath so proposed as aforesaid was, at the time of the last-mentioned meeting, and when the defendant acted as a commissioner as hereinafter mentioned, a footpath which could be made with less expense than the said footpath in the said order mentioned; and that the defendant, as such occupier as aforesaid, was, during the whole of the last-mentioned meeting, by reason of the said greater cheapness of the said footpath so proposed as aforesaid, personally interested in the question, whether the said original order should be so acted upon, or so altered as aforesaid. And the plaintiff further saith, that he the defendant, then and there being so personally interested as aforesaid, well knowing the premises, but not regarding the said statute, did at the said meeting last mentioned, in the city and county aforesaid, act as a commissioner in the execution of the said act, in the matter in which he was so interested as aforesaid, in this, that he the defen-

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dant at the last-mentioned meeting, then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, act in execution of the said act on the occasion aforesaid, and did then and there vote for the alteration of the said original order, according to the said proposal, contrary to the form of the statute in such case made and provided, whereby, and by force of the statute, the defendant hath forfeited the sum of 100*l.* The second count stated, that the defendant did act as a commissioner, under and in execution of the said act, in the matter in which he was so interested as aforesaid, in this, that he the defendant at the said last-mentioned meeting, then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, acting under and in execution of the said act as aforesaid, take part in the discussion of the question, whether the said original order should be so acted on, or so altered as aforesaid, contrary, &c. (concluding as in first count). The third count stated, that the defendant acted as a commissioner in execution (&c. as in first count), in a case wherein he the defendant at the time of so acting as aforesaid was personally interested in the matter in question, contrary, &c. Plea, *nil debet.*

The section (18) of the 9Geo. 4, cap.xxvii, imposing the penalty for the recovery of which this action was brought, was in the following terms:—"That no person shall be capable of acting as a commissioner in the execution of this act during the time he shall hold or enjoy any office or place of profit under this act, or be concerned or interested (except as a creditor on the rates or assessments, or as a shareholder in any company of proprietors for the manufacture of gas,) in any contract made under or by virtue of this act, or in any case wherein he shall be personally interested in the matter in question; and if any person, not being qualified in the manner by this act directed, or not having taken and subscribed the oath as aforesaid, or, being a quaker, not having made and sub-

scribed the affirmation as aforesaid, or being or becoming disqualified by any of the causes in this act mentioned, shall act as a commissioner in the execution of this act, every such person shall for every such offence forfeit and pay the sum of 100*l.*, with full costs of suit, to any person who shall sue for the same in any of his Majesty's Courts of Record at *Westminster*, by action of debt, or on the case, or by bill, plaint, or information, wherein no essoign, protection, wager of law, or more than one imparlance, shall be allowed; and every person so sued or prosecuted shall, upon the trial, prove that he was at the time of acting qualified as aforesaid, or otherwise shall be liable to the said penalty and costs, without any other proof or evidence being given on the part of the plaintiff or prosecutor, than that such person hath acted as a commissioner in the execution of this act: Provided always, that all acts and proceedings of any person acting as such commissioner, although not duly qualified, had or done previously to his being convicted of any such offence, shall be as valid and effectual notwithstanding such subsequent conviction, as if such person had been duly qualified."

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At the trial, before *Tindal*, C. J., at the last *Spring Assizes* for the county of *Lincoln*, the facts of the case, as stated in the introductory part of the first count, were proved; and, in order to establish the charge against the defendant of acting as a commissioner, it was shewn that the defendant, at the meeting of the 26th *October*, took an active part in the discussion, and spoke in favour of the original motion. It appeared, that, in common with the other commissioners, he received on this occasion a balloting ball, and took it into another room where the balloting box was, and where there were thirty-two commissioners present. After the balloting, the box was found to contain thirty-two balls, twenty in one drawer, eleven in another, and one in a third drawer, in which it appeared to

*Exch. of Pleas,* have been placed by mistake. The Chief Justice left it to the jury to say whether the defendant had voted at all; that, if he had voted, it was immaterial which way his vote had been given; and that the voting would constitute an acting as a commissioner within the statute. The jury having found that the defendant had not voted, a verdict was entered for him, the Chief Justice giving the plaintiff leave to move to enter a verdict upon the third count, which charged the defendant generally with acting as a commissioner, being personally interested. *Balguy* accordingly obtained a rule to enter a verdict for the plaintiff on this count, or for a new trial, on the ground of misdirection in the Chief Justice in only leaving the question of voting as evidence of acting.

*Adams, Serjt., and Amos* now shewed cause.—The defendant did not by his conduct bring himself within the 13th section of the 9 Geo. 4. [Parke, B.—That is the only question, whether what was done by the defendant amounted to *an acting*.] The jury have found that he did not vote. The statute says, that, if any person shall *act* as a commissioner, being personally interested, he shall be liable to the penalties. Now the defendant did not act; he merely spoke upon the question. If the simply speaking upon the question were *an acting*, the party might incur a penalty by speaking against his own interest. The act could not intend that an interest like that which the defendant had in the decision of the question should exclude a commissioner from acting in the execution of his duty as such, otherwise, in many cases, all the commissioners might be said to be interested, and the act be incapable of being carried into execution.

*Balguy, Hill, and Follett, contrà.*—The learned Judge was mistaken in leaving it to the jury that there could not be *an acting* without voting. [Parke, B.—Is there

any thing in the local act to prevent other parties from attending the meetings of the commissioners; and might not the defendant have attended as one of the public, interested in the proceedings of the commissioners?] If he had such a right to attend in his private capacity, it was a question for the jury whether he did so, and ought to have been so left to them. Here the defendant moved resolutions and took up a balloting ball. It is not necessary that a man should vote in order to act. A member of Parliament acts as such when he makes a speech in his place, though he does not vote upon the question. The defendant was interested in the amount of the rate; he acted as a commissioner, and he has thereby incurred the penalty. The object of the statute must have been to exclude from the meetings of the commissioners those who stood in such a situation as this defendant.

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*Cur. adv. vult.*

The judgment of the Court was now (*a*) delivered by—

**PARKE, B.**—A case of *Charlesworth v. Rudgard* was argued before us in the course of this term, which was an action to recover a penalty under a local act for paving, lighting, watching, and improving the city of *Lincoln*. By the 5th section of the act commissioners are appointed for carrying it into effect; and by the 13th section it is provided, that, if any commissioner, personally interested in any matter in question, shall act as a commissioner in the execution of the act, he shall forfeit the sum of 100*l.* The third count of the declaration charged the defendant simply with acting as a commissioner, being personally interested in the matter in question. In addition to the mayor and other *ex-officio* commissioners, there were thirty commissioners elected from the different parishes of the city, and of this number the defendant was one. An order had been made at a meeting, held previously

(*a*) The last day of *Trinity Term*.

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to that at which the defendant is alleged to have acted, for making a footway, passing close in front of the defendant's premises, amongst others. Another meeting being called for the purpose of again considering the order respecting the footway, the defendant attended that meeting, and moved that the order should be rescinded, except so far as regarded his own property. This motion was rejected; and another motion was then made with regard to executing the work in a different manner from that originally proposed. Upon this question the defendant spoke, urging that the method then proposed was preferable, as it required less expensive materials; and he afterwards proceeded to ballot with the other commissioners. This is the occasion upon which the defendant is charged with having acted as a commissioner. On examining the box, twenty balls were found for the motion, and eleven balls against it, with one ball dropped into a wrong drawer. It was left to the jury, whether there was evidence of the defendant acting as a commissioner in voting; but his conduct at the meeting was not left to them as evidence to the same effect. The jury, not being satisfied that he had voted, found a verdict for the defendant. We think that there was other evidence of the defendant's acting as a commissioner besides the voting; and that his having taken a part in the discussion respecting the mode of executing the work, should have been left to the jury as evidence of *acting* within the meaning of the 13th section of the local act. If the defendant had appeared on that occasion merely in his private capacity, for the purpose of making representations to the commissioners upon the matter in question, as it regarded his own interest, he would not have incurred the penalty; but, if he attended as a commissioner, and gave his reasons to his brother commissioners, and used his influence with them for the purpose of governing their decision, then it would have been otherwise, and the question ought to have been submitted to the jury in

which of these capacities the defendant did appear. The expense of the footway being cast upon the defendant rendered him personally liable. We are therefore of opinion that there must be a new trial.

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### Rule absolute for a new trial (*a*).

(*a*) It was also urged, that the defendant was entitled to the notice of action required by the local act to be given; but the Court expressed a clear opinion, that the clauses only applied to what was done by

virtue of the act, and not to penalties for acting in direct contravention of it. See the cases referred to in this case, post, *Hilary Term, 1835.*

### MINTER v. WELLS and Another.

THIS was an action on the case for an infringement of a patent obtained by the plaintiff. The trial took place at the Sittings after last *Trinity Term*, before *Alderson, B.*, when a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit, on an objection taken to the specification. The patent had been obtained for an invention called "*Minter's Patent Reclining Chair*," which was thus described in the specification:—"My invention of an improvement in the construction, making, or manufacturing of chairs, consists in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, and whereby a person, sitting or reclining on such chair, may, by pressing against the back, cause it to take any inclination, and yet at the same time the back of such chair shall, in whatever situation it is placed, offer sufficient resistance and give proper support to the person so sitting or reclining in such chair." The specification then set forth the mode of making and using the chair, and concluded thus:—"Having now described the various parts represented

Where, in summing up his invention, a patentee stated it thus:—"My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair as above described."—*Held*, that this was not a claim to the principle of the lever, but to an application of that principle to a certain purpose by certain means, and that the patent was good.

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in the drawing, and the manner of their action, I would have it understood that I lay no claim to the separate parts of a chair which are already known and in use, neither do I confine myself to making them in the precise shapes or forms represented. But what I claim as my invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, as above described."

*Godson* now moved to enter a nonsuit.—The claim of the plaintiff is either to the principle itself, in which case his patent is bad; or to the mode of applying that principle, which has not been infringed by the defendant, who has not made his chair in the manner described by the specification. What the plaintiff claims is the application of a self-adjusting leverage, that is to say, he claims the principle of the common lever; he therefore claims a mere principle of mechanics, which cannot be appropriated, and the patent is invalid. Where a patentee sums up his claim as for a mere principle, the case of *The King v. Cutler* (*a*) is an authority to shew that the patent cannot be supported. There Lord *Ellenborough* says—"The defendant has confined himself, by thus summing up the extent of his invention, to the benefit of the principle;" and there was a verdict for the Crown. Two patents founded upon the same principle may be good, if neither claim the principle, as in *Hullett v. Hague* (*b*), where the principle of evaporating sugar at low temperatures was applied in two distinct patents, by distinct methods and apparatus, and both patents were sustained.

**Lord LYNDHURST, C. B.**—Every invention of this kind must include the application of some principle; and here the application of the principle of the lever to the construction of a reclining chair constitutes the machine, the

(*a*) 1 Stark. 355.

(*b*) 2 B. & Ad. 370.

invention of which the plaintiff claims. He does not, as it is asserted, claim the principle in the summing up of his specification; but he claims the invention of applying that principle in a certain manner and by certain machinery. He says, what I claim is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair, *as above* described. The claim is not for the lever only, but for a self-adjusting lever; he does not confine it to any particular form, but claims the chair constructed on this principle in whatever shape or form it may be.

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**PARKE, B.**—It was proved by all the witnesses at the trial that a self-adjusting lever was never before applied to the construction of chairs. The claim of the plaintiff is not to the principle, but to the combination of the principle and the machine—the application of the self-adjusting lever to the construction of a chair. His summing up shews this—“I claim as my invention the application of a self-adjusting leverage to the back and seat of a chair.” This is not claiming a principle.

The rest of the Court concurring—

Rule refused.



**DANIEL GUILFORD WAITE, Clerk, v. WILLIAM BISHOP,  
JOSEPH LAWRENCE, CHARLES BROOKE, and JOHN  
NOKES.**

**T**HIS was an application under the Interpleader Act, when the Court directed that the facts should be stated in the following case:—

A sequestration obtained by the assignees of an insolvent incumbent operates

only from the time of publication, and does not entitle the assignees to the arrears of composition for tithes due before publication.

Lodging a writ of *levavi facias* with the registrar of the bishop of the diocese, does not bind the property of the incumbent from the time of such lodging.

*Ech. of Pleas,*  
1834.

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The plaintiff in this case is rector of *Blagdon*, in the county of *Somerset*. In the year 1825, the plaintiff granted an annuity to one *John Britten*, of *Clapham Common*, in the county of *Surrey*, and secured the payment thereof by a demise of his rectory of *Blagdon* aforesaid, and by warrant of attorney intitled in a cause *Britten v. Waite*. In the year 1828, the annuity being in arrear, the said *John Britten* applied for and obtained sequestration against the rectory aforesaid, and continued in receipt of the tithes and profits thereof until the month of *March*, 1832. On the 8th day of *May*, 1832, the plaintiff *Waite* applied in the Court of *King's Bench*, through Mr. *John Nokes*, an attorney, for and obtained a rule *nisi* for setting aside and delivering up the annuity deeds, warrants of attorney, and judgments.

In *Trinity Term*, 1832, the said rule *nisi* was made absolute; and it was ordered that no further proceedings should be taken on the writ of sequestration; and there was a reference to the Master respecting the monies received by *Britten*, with liberty thereafter to issue a fresh writ of sequestration for any future arrears of the said annuity.

The said *John Britten* refused to withdraw his writ of sequestration from the living of the plaintiff, alleging that the said rule absolute did not order him to do so. In the month of *April*, 1832, before the application to the Court of *King's Bench* for the rule *nisi* above mentioned, the plaintiff executed a warrant of attorney to the said *John Nokes*, in the penal sum of 100*l.*, for certain costs due from the plaintiff to the said *John Nokes*, upon which warrant of attorney the said *John Nokes* signed judgment, and issued a writ of *levavi facias*, according to the forms prescribed by law, and caused the same to be filed in the office of the Lord Bishop of *Bath and Wells*, on or about the 26th day of *April*, 1832, for the purpose of procuring sequestration against the living of *Blagdon*.

aforesaid, the sequestration of the said *John Britten* being still upon the said living.

In the month of *June*, 1832, after the above rule was made absolute, the plaintiff executed a second warrant of attorney to the said *John Nokes*, in the penal sum of *200l.*, for other costs due from the plaintiff to the said *John Nokes*, upon which second warrant of attorney the said *John Nokes* likewise signed judgment, and issued a writ of *levavi facias* according to the forms prescribed by law; and caused the same to be filed in the office of the said Lord Bishop of *Bath* and *Wells*, on or about the 18th day of *June*, 1832, for the purpose of procuring sequestration against the said living of *Blagdon* aforesaid, the sequestration of the said *John Britten* being still upon the said living.

The said *John Nokes* caused an office copy of the said rule absolute, of *Trinity Term*, 1832, to be served upon Mr. *Purfitt*, the registrar of the Bishop of *Bath* and *Wells*, by Measrs. *Melliar, Lovell & Co.*, solicitors, of *Wells*; when the said Mr. *Purfitt* informed them that sequestration could not be granted to the said *John Nokes*, in consequence of the said *John Britten* not having withdrawn his writ of sequestration from the said living.

The plaintiff, having been arrested for debt, filed his petition on the 10th day of *October*, 1832, to be discharged from his debts by virtue of the act of Parliament passed for the relief of insolvent debtors; and, on the 23rd *February*, 1833, the plaintiff was discharged accordingly, having inserted in his schedule the debt claimed by the said *John Britten*, and likewise the debt claimed by the said *John Nokes*, by virtue of the said two warrants of attorney and writs of *levavi facias* issued upon the judgments entered up thereon. The above-named defendants, *William Bishop*, *Joseph Lawrence*, and *Charles Brooke*, were duly appointed assignees of the estate and effects of the above plaintiff.

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On the 14th day of *May*, 1833, (being after the adjudication of the plaintiff), the Master of the Court of *King's Bench* made his *allocatur* upon the matters referred to him, in the following words and figures:—

|                                                         | £ s. d.     |
|---------------------------------------------------------|-------------|
| " Amount of tithes received . . . . .                   | 909 19 5½   |
| Payments thereout . . . . .                             | 873 7 2     |
| Balance in the hands of the sequestrator                |             |
| towards payment of the arrears of the annuity . . . . . | } £36 12 3½ |

On the 24th of *May*, 1833, the Court of *King's Bench* granted to the said *John Britten* a rule *nisi*, to shew cause why he should not be at liberty to proceed on his writ of sequestration.

The assignees of the plaintiff took no steps to oppose the said rule, whereupon the plaintiff himself (*Waite*) instructed counsel through his attorney to oppose it, on the ground, that, by the rule of Court of *Trinity Term*, 1832, the said *John Britten* was reduced to the condition of a mere judgment creditor; and, the plaintiff *Waite* having been adjudicated before *Britten* could issue a fresh writ of sequestration, that his claim against the living was destroyed by virtue of the 34th sect. of 7 *Geo. 4.* c. 57. The same rule coming on for argument on the 12th day of *June*, 1833, the Court of *King's Bench*, on consideration of the facts stated there, relating to Mr. *Britten's* sequestration, discharged the said rule.

On the 14th day of *May*, 1833, the assignees of the plaintiff filed an order of adjudication in the office of the Lord Bishop of *Bath* and *Wells*, pursuant to the directions of the Insolvent Debtors' Act, but could not obtain sequestration, in consequence of Mr. *Britten's* still refusing to withdraw his writ of sequestration.

On the 13th *November*, 1833, the assignees of the

plaintiff obtained from the Court of *King's Bench* a rule to shew cause why the sequestration, at the suit of the plaintiff, (*Britten*), should not be set aside, or removed from the benefice, the plaintiff retaining all monies lawfully levied thereunder, and with liberty to the assignees under the Insolvent Debtors' Act to issue a sequestration upon such living.

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Mr. *Nokes*'s opposition to the rule as regarded the permission of the Court to the assignees to issue a sequestration was not persisted in, it having been proposed by the assignees of the plaintiff *Waite*, that the claims of the said *John Nokes* should be satisfied out of the first proceeds from the living; and that the details of this arrangement should be settled between the counsel for the parties.

The rule came on for argument on the 22nd day of November, 1833, when the Court ordered that the sequestration at the suit of the plaintiff *Britten*, should be removed from the benefice of the defendant, the plaintiff retaining all monies lawfully levied thereunder; and with liberty to the assignees under the Insolvent Debtors' Act to issue a sequestration upon the said living.

On the 8th January, 1834, the said *John Britten* withdrew his writ of sequestration; and, on the 12th January, 1834, the sequestration of the assignees of the plaintiff was duly published. From the month of May, 1832, to the said 12th of January, 1834, no creditor of the said plaintiff could receive the proceeds from the said living, *John Britten*, the then sequestrator, being restrained by the order of the Court of *King's Bench*, and the Bishop of Bath and Wells being prevented from granting sequestration to any other creditor, in consequence of the writ of the said *John Britten* being still on the said living. The plaintiff having been advised that he was, by virtue of the provision contained in 7th Geo. 4, c. 57, s. 28, the only party entitled to the tithes of the said living accrued due from the month of

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claimed the same as they respectively became due in the months of *March* and *September*, 1833. A great number of the parishioners having refused payment to the plaintiff, several actions were brought at his suit in *Trinity* Vacation last, in this honourable Court, and, amongst others, against *Thomas Roworth*, *John Bailey*, the elder, and *John Stevens*. The tithes being claimed by several parties, the last-named defendants took out a summons under the Interpleader Act, 1 & 2 Will. 4, c. 58, which, being attended by all parties interested, before Mr. Baron *Bailey*, he ordered that the amounts sued for should be paid into Court, and all further proceedings stayed until the fourth day of the following term.

In *Hilary* Term, 1834, the matter was brought before this honourable Court, when the above-named plaintiff, and the defendants, *William Bishop*, *Joseph Lawrence*, and *Charles Brooke*, and *John Nokes* appeared and stated their respective claims to the tithes in question. The said *William Bishop*, *Joseph Lawrence*, and *Charles Brooke* founded their right upon their appointment as assignees of the above-named plaintiff, and upon the sequestration then granted to them by the bishop of the diocese. The said *John Nokes* alleged in his behalf, as the fact really was, and stated by Mr. *Purfitt*, the registrar of the Lord Bishop of *Bath and Wells*, that the sequestration had been granted to the said assignees, subject to any right he, the said *John Nokes*, might have to the tithes in question; and claimed to have such right from the circumstance, that, having lodged his writs of *levavi facias* in the office of the bishop of the diocese, he had done all that the law enabled him to do; that sequestration would have been granted to him had not the said *John Britten* been in possession of the said living by virtue of his said writ of sequestration, and that such possession was tortious, and a violation of the rule of *Trinity* Term, 1832, made in the cause of *Britten*.

v. *Waite.* The plaintiff *Waite* claimed the tithes on the grounds hereinbefore stated. All these matters being stated to the Court, orders were respectively made, &c. (The case then set forth the orders made respecting the argument of the case in the several causes, with directions as to the money paid into Court, &c.)

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The *Attorney-General* for the plaintiff *Waite*.—Three parties claim title to the arrears of tithes: the plaintiff, who is the incumbent; the assignees of the plaintiff under the Insolvent Act; and a judgment creditor of the plaintiff: and the question for the decision of the Court is, which of these parties is entitled. There are certain dates which it will facilitate the argument of this question to bear in mind—*first*, the discharge of the plaintiff by the order of the Insolvent Court, 23rd February, 1833; *second*, the time of the arrears in question becoming due, *viz.* in March and September, 1833; *third*, the time of the actions being brought by the plaintiff, *Trinity* vacation, 1833; and *fourth*, the time of the sequestration of the assignees being published, *viz.* 12th January, 1834. *Prima facie*, the incumbent is entitled to maintain this action, and to recover the arrears. He might have sued all the occupiers, who could not have set up any defence. The question then is, whether any of the other claimants can shew a better title; and, *first*, with regard to the title of *Nokes*, the judgment creditor. [Parke, B.—Is there not a question whether the prior sequestration of *Britten* did not prevent the plaintiff from bringing his actions?] *Britten* is not a party before the Court. All the proceedings upon his sequestration were stayed by the order of the Court of *King's Bench*. He might have issued a fresh sequestration for subsequent arrears, but he has not chosen to do so. [Alderson, B.—It may be a question whether the Interpleader Act does not exclude all those who neglect to make their claim. Lord *Lyndhurst*, C. B.

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—*Britten* was allowed to retain all that he had received under the first sequestration, with liberty to issue another. That does not affect the arrears now in question. *Parke, B.*—*Britten* is not before the Court, and the operation of his sequestration was put an end to. He may, therefore, be considered as entirely out of the case.] *Notes* can have no claim to the arrears, because, in fact, his sequestration never issued; and whatever remedy he may have against the bishop, for not granting the writ, under the supposition that the prior sequestration of *Britten* prevented him from so doing, it is clear that, without such sequestration, he can make no valid title to these arrears as against the incumbent. The next point is, whether the title of the assignees under the Insolvent Act is preferable to that of the plaintiff. The arrears could not pass under the general assignment, for they did not become due until after. The sequestration of the assignees was not published before the 12th January, 1834, and at that time the plaintiff's actions had been commenced; and, before the sequestration (*a*), the property could not pass to the assignees. *Bishop v. Hatch* (*b*).

(*a*) It does not seem to be well settled from what period the property is bound by the sequestration. In *Bennett v. Apperley*, 6 B. & C. 634, 9 D. & R. 673, S.C., Lord Tenterden says—"It may be admitted, that, until publication, no person's rights can be interfered with." But *Bayley*, J., says, "I think that the property is bound from the time when the sequestrator is appointed, and that the publication of notice is only necessary in order to give priority against conflicting rights." As to the effect of writs in bind-

ing property, see *Paine v. Drew*, 4 East, 523; *Lowthal v. Tomkies*, B. N. P. 91; *Rex v. Allnutt*, 16 East, 278; *Giles v. Grover*, 1 Clarke & F. 74—177; *Lucas v. Nockells*, 10 Bingh. 182.

(*b*) 1 Ad. & Ell. 171. 7 Geo. 4, c. 57, s. 28—"Provided always, and be it further enacted, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy for the

**Harrison**, for the assignees.—At the time of the commencement of the plaintiff's actions, *Britten* was the continuing sequestrator. The terms of the rule merely were, that no further proceedings should be taken on his sequestration; but the sequestration itself was not annulled. It is sufficient to defeat the title of the plaintiff that a sequestration *de facto* was existing; and that the bishop considered it as so existing appears from his refusal to grant another sequestration. But, admitting that before the publication of the assignees' sequestration the tithes were the plaintiff's, and that the operation of *Britten's* sequestration was put an end to, the question is, to whom the arrears of tithe belonged? *Britten* was prevented from receiving them, having issued no second sequestration. *Nokes* could not have them, for he had no sequestration at all; the plaintiff had not collected or received them; and in this state of things the sequestration of the assignees issued. That sequestration immediately entitled them to the accruing payments, and to the arrears then due. Supposing the arrears to belong to the plaintiff, all his title to them is transferred to the assignees.  
 [Parke, B.—You contend, that, since the commencement of the suit, circumstances have occurred to defeat the plaintiff's title.] Certainly; his title is defeated by the superior title of the assignees. Great injustice would ensue by holding that they are not entitled to the arrears. Under their sequestration the arrears due to the curate,

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purposes of this act; provided always nevertheless, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profit of any such benefice for the payment of the debts of such prisoner; and the order of adjudication made in the matter of such prisoner's pe-

tition, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceeding to authorize the same; and such sequestration shall accordingly be issued upon any writ of *levari facias* founded upon any judgment against such prisoner."

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amounting to 120*l.*, may be claimed, and they ought, therefore, to be entitled to the arrears of the profits. As against *Nokes*, the assignees take the same ground that *Waite* himself does, and say that his title is bad, because no sequestration has ever been issued by him. As against *Waite*, they say that their sequestration, duly published, operates so as to vest in them both the accruing payments, and those which *Waite* has suffered to be in arrear (a). *Bishop v. Hatch* (b) is a decision in favour of the assignees as between themselves and the judgment creditor.

*Addison*, for *Nokes*.—*Nokes*, the judgment creditor, having done all that by law was required of him to perfect his title to the arrears of tithe, has now the preferable claim. By lodging his writs regularly with the registrar of the bishop, and directing him to issue sequestrations thereupon, he has sufficiently complied with the requisitions of the law. His title has priority over that of the assignees, whose sequestration was granted expressly subject to his claim. [Lord *Lyndhurst*, C. B.—The simple question is, whether he is entitled to maintain an action.] At all events, as against the plaintiff, *Nokes* may claim the arrears. When his writs were lodged with the bishop,

(a) Where a notice to quit, given by a rector to the tenant of his glebe land, expired on the 25th of December, and on the 17th of January following a sequestration was read in the church, and the rector afterwards, by order of the sequestrator, received from the tenant, who held over, a weekly allowance, which he described in a receipt as issuing out of the tithe and glebe; it was held, that the rector might still maintain an ejectment, laying the demise on the 1st

January, as between the 25th December and the 17th of January the tenant was a trespasser. *Doe d. Morgan v. Bluck*, 3 Campb. 447. *Dampier*, J., in that case says—“From the day of publication the incumbent is not entitled to the rents and profits of the glebe lands while the sequestration remains in force; but he is entitled to such rents and profits down to that time from the expiration of the notice to quit.”

(b) 1 Ad. & Ell. 171.

*Britten's* sequestration was still operating. It was afterwards set aside, and the arrears in question accrued in the interim. Now, it is laid down that a sequestration is analogous to a *fieri facias*, and that the bishop, with regard to the former, stands in the same situation as the sheriff with regard to the latter; *The King v. The Bishop of London* (a); and, if two writs of *fi. fa.* be delivered to the sheriff to be executed, and the first of these writs, after a levy under it, is set aside, the levy is applicable to the second writ; so here, on *Britten's* sequestration being set aside, the arrears which might have been taken under it, became applicable to *Nokes's* claim, under the writs then lying in the registrar's office. The sequestration might have been published after the return day of the *levari facias*. *Bennett v. Apperley* (b). It is said, that the sequestration will only bind the property from the time of its publication; but that is with respect to third persons, for, with respect to the party himself against whom it issues, it binds the property from the time of the delivery of the writ to the bishop. If so, the plaintiff cannot claim the tithes; nor can the assignees, for *Nokes's* title is paramount to theirs.

The *Attorney-General*, in reply.—It is admitted on all hands that *Britten's* title is out of the question. His sequestration was entirely set aside. For *Nokes*, it is argued that he has a sort of lien on the property, which it is said was bound by the delivery of the writs of *levari facias* to the bishop. No authority is cited for that position; nor has there been any decision referred to on the part of the assignees to shew that a right of action is transferred by the assignment; and to hold so would be contrary to the words of the writ and to the principles of law. [Parke, B. Supposing that no composition in this case had existed,

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(a) 1 Dowl. & Ry. 487; and see (b) 6 B. & C. 630; 9 D. & R.  
*Marsh v. Fawcett*, 2 H. Bl. 582. 673, S. C.

*Exch. of Pleas*, no right of action on the statute of *Edw. 6* would have been transferred.] If so, how can the right of action

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to these arrears be transferred? [Lord *Lyndhurst*, C.B.—It seems to me that the words of the writ are prospective only.] It would be contrary to all analogy that a writ of execution, such as this is, should extend to choses in action.

Lord *LYNDHURST*, C. B.—The title of *Britten* may be considered as entirely out of the question. He has been served with the rule, and does not appear for the purpose of making a claim. The rector is the person who has the apparent right to these arrears, by virtue of his possession of the rectory. The title of the assignees did not accrue before the 12th of *January*, when their sequestration was published. Now, unless the effect of that sequestration was retrospective, their title cannot defeat that of the plaintiff, and I am of opinion that it is not retrospective. To hold it so would be inconsistent with the form of the writ. According to the language of the writ, it applies only to the accruing property of the rectory. With regard to *Nokes*, he also is out of the question, for his sequestration was never published.

*PARKE*, B.—I am of the same opinion. The only question is as to the title of the assignees, and that depends upon the point whether or not their sequestration had a retrospective effect. No authority has been shewn to induce the Court so to hold, and the language of the sequestration itself is at variance with such a construction. Nothing passes under it but the future profits of the rectory, and not such rights as rent already accrued due, or rights of action like these arrears of tithes.

*ALDERSON*, B.—The rector was the party in possession at the time of these arrears accruing, and, as such, is now entitled to them. The sequestration does not extend to

antecedent fruits. Were we to hold that it did so extend much inconvenience would follow with regard to prior sequestrations.

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GURNEY, B., concurred.

Judgment for plaintiff (*a*).

The costs of the application to the Court were ordered to be paid by *Nokes* and the assignees in equal moieties. The defendants to pay the plaintiff's costs of the action up to the time of payment into Court.

(*a*) The following is the form in which the writ of sequestration runs:—"We, therefore, proceeding by virtue of and in obedience to the said writ, and inasmuch as in us lies duly executing the same, have sequestered all and singular the tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments of and belonging to the rectory [*or 'vicarage'*] and parish church of

in the county of      and diocese of      of which the said C. D., mentioned in the said writ, is the present rector [*or 'vicar'*], and by these presents do sequester

the same, and give and grant unto you, the said E. F., full power and authority to sequestrate, collect, levy, gather, and receive all and singular the tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments of and belonging to the rectory [*or 'vicarage'*] and parish church of      aforesaid, and the same to sell and dispose of, and the money arising therefrom to apply to and for the due payment of the debt and costs in the said writ mentioned, subject to the said indorsement on the said writ; also subject, &c."

### BUTTERWORTH v. CRABTREE.

THIS was a country cause, in which issue was joined in June; and an order was obtained, pursuant to the statute 3 & 4 Will. 4, c. 42, for trying it before the sheriff. No

In a country cause ordered to be tried before the sheriff, the plaintiff has the same period of time for proceeding as if no such order had been made.

time for proceeding as if no such order had been made.

*Exch. of Pleas.* notice of trial was given, and it appeared that two courts  
1834. had been held by the sheriff between the issuing of the writ of trial and this term, at either of which the cause  
**BUTTERWORTH v.  
CRABTREE.** might have been tried. In the course of this term a rule was obtained by *Alexander* to shew cause why there should not be judgment as in case of a nonsuit; against which cause was now shewn by—

*Rawlinson*, who contended that the application was made too early, there having been no default in not having proceeded to trial, no notice of trial having been given.

*Alexander*, contrà, relied upon *Mullins v. Bishopp*(a), as shewing that the holding of two sheriff's courts is equivalent to two assizes having taken place, which, according to the usual practice; brought the plaintiff into default.

**PARKE, B.**—There is nothing to alter the old practice with regard to the time of making this application. The defendant seldom derives any benefit from these motions, which have not always his interests in view. If the plaintiff chooses to give notice of trial, he is then bound to proceed in pursuance of that notice, and according to the practice of the Court. But he has not done so here, and the application is, therefore, premature. It may be desirable to consider whether it would not be better that country causes, where the trial is before the sheriff under the new act, should not be put upon the same footing as town causes with respect to the time of proceeding.

Rule discharged.

(a) 2 DowL P. C. 527.

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**BLACK v. SANGSTER.**

**T**HIS plaintiff obtained an order to amend his declaration, with leave to the defendant to plead *de novo* to the amended declaration. The order was duly served upon the defendant. The plaintiff notwithstanding, without amending, gave notice of trial, and the cause was tried before *Tindal*, C. J., at the last assizes for the county of *Surrey*, when it was taken as an undefended cause.

The plaintiff, after obtaining an order to amend his declaration, with leave to defendant to plead *de novo*, may abandon that order and proceed to trial without procuring it to be rescinded.

*Buckle* now moved to set aside the verdict which had been obtained for the plaintiff, on the ground that, after obtaining the order to amend, it was not competent to him to proceed to trial without rescinding that order. He cited *James v. Kirk* (a).

**PARKE**, B.—The plaintiff applied to amend, and had leave to do so upon certain terms. Those terms he does not think proper to accept, and proceeds to trial upon the declaration as it stood. He was perfectly at liberty to take that course, and there is no irregularity.

The rule was, however, granted upon certain terms, there being an affidavit of merits.

(a) 1 Chitty's R. 246.

**CLEASBY v. POOLE.**

**UDALL** having obtained a rule for judgment as in case of a nonsuit—

It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff is poor, and has neglected to furnish his attorney with money to conduct the suit.

*Comyn* now shewed cause upon an affidavit, which stated, that, in consequence of the plaintiff's poverty, and his failing to furnish his attorney with funds to carry on the suit according to his promise, the attorney had not proceeded, and he offered to give a peremptory undertaking.

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PARKE, B.—The cases have never yet gone to that extent. Such an excuse has never been admitted, and I do not think it sufficient.

Time was given to produce a better affidavit.

—  
ENSALL v. SMITH.

To a declaration on promises to pay on request, the defendant pleaded as to part, that he *has paid the same*, and as to the residue *non assumpsit*, and concluded the whole plea to the country:—  
*Held* bad on special demur-  
rer.

**A**SSUMPSIT for goods sold and delivered, and on an account stated. The declaration concluded in the usual form, that the defendant, although requested, had not paid the money, or any part thereof. Plea, as to 4*l*l**, part of the monies in the said declaration mentioned, the defendant says, that he has paid the same; and, as to the residue of the said monies, that he did not undertake or promise, &c. The whole plea concluded to the country. Special demurrer, on the ground that the plea was pleaded with an improper conclusion.

**Dundas**, in support of the demurrer.—A plea of payment must conclude with a verification. This was always the case before the new rules; and there is no reason to say, that, because it is joined in the same plea as the general issue as to other part, this rule can be departed from.

**Mansel, contrà**.—The form of the plea is good. It is simply a traverse of a material fact alleged in the declaration, *viz.* the payment. The declaration avers that the defendant did not pay the sum of money therein mentioned; the plea alleges that he did. Here then is a complete joinder of issue, which ought to conclude to the country.

PARKE, B.—The plea, in its present form, assumes that there can be no other answer to it than a simple denial. That is not so. It is perfectly consistent with the plea

that the defendant may have made the payment *after* request; whereas the declaration states that he did not pay on request. The plea of payment, when so pleaded, ought to conclude to the Court with a verification.

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The rest of the Court concurring—

Judgment for the plaintiff (*a*).

(*a*) The real objection is, that there was no conclusion to the first plea. The plea was wrongly pleaded as one plea, whereas it consisted of two distinct pleas, pleaded as they might be before the statute of Anne, to distinct parts of the declaration, and not double pleas requiring the leave of the Court. The first part, therefore, ought to have concluded to the court, and the second to the country.

Since the new rules as to plead-

ing came into operation, it has not been unusual to conclude pleas of payment to the country. The principal case will settle all doubt on this subject, as it establishes the clear distinction between a plea of payment, which shews that no breach has been committed, and which is properly a traverse of the breach, and a plea which confesses the breach, and avoids it by payment and satisfaction subsequent.

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JUPP and Others *v.* GRAYSON, and GRAYSON *v.* JUPP.

THESE causes and all matters in difference between the parties thereto were referred, by an order of Mr. Baron Vaughan, to the award of two persons, not members of the legal profession, with power to name an umpire; the costs of the suits, and of the reference and award, to abide the event. The arbitrators named an umpire, who awarded that a certain sum was due from the defendant, *Grayson*, to the plaintiffs in the action against him, which he directed to be paid by *Grayson* to the plaintiffs, and to be accepted by them in full satisfaction of all the matters in difference between those parties at the time of making the said order of reference; and, with regard to the second action, he awarded that the plaintiffs had sus-

Where a cause is referred, the costs of the suit and of the reference and award to abide the event, the arbitrator need not notice the costs in his award.

There is no distinction with regard to legal and other arbitrators; and the Court will not examine an award, because it has been made by one who is not in the profession of the law.

*Exch. of Pleas,* tained damages to a certain amount, and he ordered such  
 1834. damages to be paid in the manner above specified.

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*Mansel* moved to set aside the award on two grounds. *First*, as not being final, there being no adjudication as to the costs, but merely as to the damages ; and, *secondly*, on a mistake by the umpire in point of law, it being proved before him, that one of the plaintiffs in the first action was not a partner, and that therefore there ought to have been no recovery in that action. He contended, that the arbitrators and umpire not being professional persons, the Court would examine the legality of the award.

**Lord LYNDHURST, C. B.**—We cannot go into the last objection. It is upon the merits, and has been submitted to the umpire, who has made his decision ; and there is no ground for the supposed distinction between professional arbitrators and others.

**PARKE, B.**—I have always been at a loss to understand the grounds upon which that distinction was founded. It is certainly stated, in some cases, that, where matters of law are submitted to a *legal* arbitrator, the Court will not interfere ; but I am not aware of any case which lays down a contrary doctrine with regard to an unlearned arbitrator. There is nothing in the objection as to the costs ; no power over them was given to the arbitrators.

**ALDERSON, B.**—The point respecting the distinction between professional arbitrators and others arose in this Court in the course of last term ; and the impression upon my mind at that time was, that the distinction had been recognised. I have since considered the question, and am now of opinion that there is no ground for the distinction. The arbitrator, whether learned or unlearned, is selected by the parties as their Judge ; and whether the

question to be decided be one of law or of fact, he is equally authorized to decide it. Is he the less a judge between the parties because he is not a professional man?

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GURNEY, B., concurred—

Rule refused (a).

(a) The same point was decided in a subsequent case in this term, of *Ashton v. Pointer*.

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**D**EBT on judgment. Plea—that the plaintiff sued out a *ca. sa.* upon the said judgment, under which the defendant was arrested and detained in execution, &c. &c. Replication—that afterwards, and whilst the plaintiff was kept and detained in custody, under and by virtue of the said writ of *ca. sa.*, to wit, on &c., the defendant applied to and obtained a certain order of the Honourable Sir James Allan Park, &c., whereby it was ordered by the said Sir J. A. P. that the defendant should be discharged out of the said custody of the said sheriff as to the said action, for an irregularity, to wit, an irregularity then alleged by the defendant to have taken place in respect of his having been before taken in execution in the said action, and discharged for irregularity; and which said order of the said Sir J. A. P. was and is as follows, that is to say, “Upon hearing the counsel and attorneyes or agents of both parties, I do order that the defendant be discharged out of the custody of the sheriff of Middlesex, as to this action, for irregularity, *he having formerly been taken in execution in this cause and discharged*, defendant undertaking not to bring any action, Dated, &c.” And the plaintiff avers, that the defendant was then accordingly in pursuance of the said order discharged out of the custody aforesaid, and from the said

A writ of *ca. sa.* set aside for irregularity is a nullity, and the taking of the defendant under it is no satisfaction of the judgment. The setting out a Judge's order in pleading is not, upon demurrer, to be taken as an admission of the facts stated in the order.

*Bach. of Pleas,* execution, under and by virtue of the said writ, for an  
1834. irregularity in respect of the said writ, and for no other cause whatever.

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To this replication the defendant demurred specially; and the note of the points intended to be insisted upon was as follows:—"The defendant demurs chiefly on the ground, that the replication does not shew that the execution was not a satisfaction of the judgment upon which the action is brought."

*Miller*, in support of the demurrer.—The question arising upon this demurrer for the opinion of the Court is, whether the taking of the defendant's body under the second writ was not a satisfaction of the judgment. [*Parke*, B.—We only know of one writ, and that has been set aside for irregularity.] It appears, upon the face of the replication, that the defendant had been previously taken under another *ca. sa.* The order of Mr. Justice *Park*, which is there set out, directs that the defendant shall be discharged for irregularity, "he having been previously taken in execution in this cause, and discharged." But supposing the replication not to shew two writs, yet it is bad in another view. The order of Mr. Justice *Park*, there set out, is made upon certain conditions for the benefit of the plaintiff, namely, that the defendant shall undertake not to bring any action. In these terms the plaintiff acquiesces, and he must therefore be presumed to have given his consent to the discharge of the defendant upon those terms; and after such consent he will not be permitted again to take the defendant in execution.

The Court stopped *Godson*, who was to have argued in support of the replication.

*Lord LYNDHURST*, C. B.—All that we know from this record is, that a writ of *ca. sa.* issued, under which the defendant was taken in execution; and that afterwards,

upon an application to a Judge at chambers, that writ *Exch. of Pleas,*  
 was set aside for irregularity. A writ set aside for ir- 1834.  
 regularity is a nullity, and void, and is no satisfaction of M'CORMICK  
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**PARKE, B.**—The order of the Judge cannot be taken as evidence of the facts stated in it. If there had been a former writ, under which the defendant was taken in execution, and if there had been a discharge from that execution, those facts might have been alleged in the pleadings, and might or might not have furnished an answer according to the circumstances of the case. But there is no allegation upon this record that there ever was another writ, as it does not appear on the pleadings that this judgment has ever been satisfied. There must be—

Judgment for the plaintiff.

#### SIMPSON v. PICKERING and Others.

**TRESPASS** for breaking and entering the close of the plaintiff, and pulling down a house, and carrying away certain goods. Plea, soil and freehold of one *Peacock*, and justification as his servants. Replication, traverse of the title of *Peacock*. At the trial, before *Gurney, B.*, at the last Assizes for the county of *Lancaster*, it appeared that the close in question had been purchased from *Peacock* by the plaintiff, who had built the house mentioned in the declaration upon it. For the defendants a subsequent conveyance, also from *Peacock* to the defendant *Pickering* was put in, which purported to convey this close amongst other premises. The latter conveyance contained a covenant for a good title, with an express exception of this close. The purchase money was never paid by *Pickering*, who mortgaged this property to *Peacock* as a security for the money. For the defen-

*A.* conveyed to *B.* a close of land, and afterwards conveyed the same close to *C.*, who mortgaged it to *A.* In trespass by *B.* against *C.* and others for breaking and entering the close, it was held that *A.* was a competent witness for the defendant.

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dants it was proposed to call *Peacock*; but he was objected to, on the ground that the effect of his testimony, by upholding the title of *Pickering*, the mortgagor of the land to him, was to give validity to his own security, and that, therefore, he was interested. The learned Judge held him to be incompetent, and the jury found a verdict for the plaintiff. *Cresswell* having obtained a rule for a new trial, on the ground that the evidence of *Peacock* had been improperly rejected—

*Wightman* now shewed cause.—The witness was properly rejected. He is called to set aside his own conveyance to the plaintiff, and is interested in supporting the title of *Pickering*, because he now claims title to the possession, under the mortgage to himself from *Pickering*. [*Parke*, B.—How can the result of this action affect his interest or title to the property? He cannot make use of the verdict; and how does it affect him, that the plaintiff recovers damages for this trespass?] The defendants assert a right to disencumber the close, and *Peacock* is called upon to support that right. Besides, there is an issue expressly joined on *Peacock's* seisin; and in case of a verdict for the defendants, it would have been found that *Peacock* was seised, and he might have made use of the issue so found. [*Parke*, B.—That is the question to be decided.] Suppose *Peacock* were to get into possession of the close, and the plaintiff should bring ejectment, the issue so found would be evidence against the plaintiff; for *Peacock*, claiming under *Pickering*, is privy in estate to him, and, according to *Kinnersley v. Orpe* (a), the verdict would be admissible. *Peacock* then, being the party really interested in this suit, was called to prove a matter beneficial to himself, and was properly rejected.

*Cresswell, contrà, was stopped by the Court.*

**PARKE, B.**—Two objections have been made to the competency of this witness: *first*, that he was interested in the result of the action; and, *secondly*, that a verdict for the defendants, for whom he was proposed to be called, might be given in evidence for him in some future proceeding. With regard to the first, it is clear that the result of this action is wholly immaterial to him. His security stands unaffected by that result, in which he has no legal interest. To shew that the verdict, if for the defendants, might have been given in evidence by the witness on some future occasion, the case of *Kinnersley v. Orpe* was cited; but there the parties were substantially the same. Here, however, that does not appear to be the case. It was also urged, that *Peacock* came to destroy the effect of his own deed; but that circumstance would not render him incompetent: it would merely go to his credit.

**BOLLAND, B.**—I am of the same opinion. *Kinnersley v. Orpe* is not an authority in the present case.

**ALDERSON, B.**—*Kinnersley v. Orpe* shews that the verdict may be given in evidence, where the parties are really the same (*a*). All that appears in this case is, that possibly *Peacock* may be the party really interested.

**GURNEY, B.**, concurred.

Rule absolute.

(*a*) “Both the *Orpes* acted under the authority of *Cotton*, who was the real defendant in both causes.” *Per Perryn, B., Kinnersley v. Orpe, ubi sup.* Lord *Ellesborough* appears not to have been satisfied with the case of *Kinnersley v. Orpe*. After remarking that it was extraordinary that it should for a moment be supposed that there could be an estoppel in such a case, he adds, “the doubt seems rather to be,

whether the record in the former action of trespass was at all admissible in evidence in the subsequent action for penalties for fishing, under the statute 5 Geo. 3, c. 14, against the defendant, who was no party to the former action.” *Outram v. Morewood*, 3 East, 366. Upon the doctrine with regard to the persons who are affected by judgments obtained against others, see 1 Poth. Obl. by Evans, 500.

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## IN THE HOUSE OF LORDS.

Sir WILLIAM HORNE, Knight, His Majesty's Attorney-General, Appellant; WILLIAM HOPE, JAMES WOOD, and JAMES BRIERLEY, Respondents.

A testator, domiciled and dying in *England*, leaves personal property situated in a foreign country, which is afterwards brought into this country, and administered here:—*Held*, that probate duty is not payable in respect of this property, under 55 Geo. 3, c. 184.

**JOHN MARSHALL**, late of *Ardwick*, near *Manchester*, in the county palatine of *Lancaster*, was, for many years previous to and at the time of his death, resident and domiciled in *England*, at *Ardwick* aforesaid, and had no other place of residence or domicile. *John Marshall* was a merchant trading with *North America*, and, at the time of his death, was possessed of or well entitled to very large personal estate and effects, amounting together to 300,000*l.* and upwards, part of which personal estate and effects was, at the time of his death, situate in this country, or on the high seas; and the residue thereof was, at the time of his death, situate in *North America*, and consisted partly of goods and effects belonging to him, and which had been sent by him to *North America* for sale, and were then remaining in the hands of his agents, and unsold, at *New York* and elsewhere in *North America*; and partly of book debts and other simple contract debts due and owing to him from divers persons, at the time of his death domiciled and resident in *North America*; and partly of monies in the public funds or stocks of the *United States* of *North America*, and in the funds or stock of the state of *New York*, in *North America*, standing partly in the name of the said *John Marshall* and partly in the name of his agent there. The said *John Marshall* duly made and published his last will and testament in writing, and a codicil thereto, bearing date respectively the 22nd day of *August*, 1823, and the 15th day of *May*, 1824, and he appointed the respondents, *William Hope*, *James Wood*, and *James Brierley*, execu-

tors of his said will and codicil. The said testator departed this life on or about the 19th day of *July*, 1824, without having altered or revoked his said will or codicil as to the appointment of executors; and the said executors, on the 28th day of *September*, 1824, applied for and obtained probate of the said will and codicil in the proper Ecclesiastical Court in this country, for the purpose of administering the whole of the said testator's personal estate and effects, or so much thereof as required probate for the purpose of being administered by the said executors, and as being the proper probate for that purpose; and the said executors paid for duty on such probate the sum of 675*l.* only, and a stamp is impressed on the said probate for that amount and no more. The duty so paid by the said executors on such probate was in respect only of such part of the testator's personal estate and effects as was at the time of his death situate in this country or upon the high seas, and which was under the value of 50,000*l.*; and the said executors have never applied for or obtained probate to be granted by any other court or jurisdiction, and have never applied for or obtained any other probate than the probate hereinbefore mentioned. The said executors, by virtue of such probate, proceeded to collect and administer, and have in fact collected and have administered in this country, the whole of the personal estate and effects of the said testator, whether situate in this country or elsewhere, at the time of the said testator's death, or the principal part thereof, to the amount of 300,000*l.* and upwards. The said executors have never applied to the commissioners of stamps to pay and have never paid any further duty in respect of the testator's estate and effects, in addition to the duty which they so paid as aforesaid, and which duty was sufficient only to satisfy the debt owing to his Majesty in respect of the probate duty upon such part of his personal estate and effects as was, at the time of his death, situate in this country or upon the high seas, and was wholly insuffi-

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cient to satisfy any duty upon such part of the personal estate and effects of the testator as was, at the time of his death, situate in *North America*. All the said executors, at the time of the said testator's death, and at the time when they took out and obtained such probate as aforesaid, were resident and domiciled in *England*, and have ever since resided and still continue to reside and are domiciled in this country.

On the 9th day of *March*, 1832, his Majesty's Attorney-General filed an information, which was afterwards duly amended, on the equity side of his Majesty's Court of *Exchequer*, against the said respondents, thereby stating, amongst other things, to the effect hereinbefore stated, and praying that it might be declared, that a debt arose and became payable to his Majesty in respect of probate duty upon the whole amount of the personal estate and effects of the said testator, including as well the personal estate and effects of the said testator, which at his death were situate in this country or upon the high seas, as the personal estate and effects which were then in *America*; and that such debt, in respect of the personal estate and effects of the said testator, which, at his death, were in *America*, was payable by the said respondents to his Majesty, and that the same ought to be paid out of the testator's personal estate and effects or otherwise by the said respondents personally, and that the necessary accounts might be decreed to be taken of the testator's personal estate and effects which, at his death, were situate in *America*, and of the amount of duty which accrued due to his Majesty for probate duty upon the probate which ought to have been taken out in respect of such personal estate and effects; and that the said respondents might be decreed to pay the amount of duty which, upon taking such accounts, should appear justly due and owing to his Majesty; and that the said respondents and each of them might be restrained by the injunction of the said Court of *Exchequer* from further

administering the said testator's estate and effects, or from intermeddling therewith, until the said duty should be ascertained and paid; and, if necessary, that a receiver might be appointed of the outstanding personal estate and effects of the said testator, with all proper directions; and that the said respondents might be decreed to pay the costs of the suit. And for general relief.

The respondents appeared to the said information, and, on or about the 21st day of *May*, 1833, they filed a general demurrer thereto.

The said demurrer was set down for argument, and came on to be heard before the Judges of the Court of *Exchequer*, at *Westminster*, in *Trinity Term*, 1833, when their lordships, by an order dated the 3rd day of *June*, 1833, allowed the said demurrer.

The appellant is advised that the said order of the Court of *Exchequer* is erroneous, and ought to be reversed, and that the said demurrer ought to have been overruled, for the following amongst other reasons:—*First*, Because, by the true construction of the acts of Parliament by which probate duty is chargeable upon the personal estate and effects of deceased persons for or in respect of which probate shall be granted, such duty is chargeable and ought to be paid upon all the personal estate and effects of a testator wherever situate at the time of his death, when probate is granted in this country; and which are collected and got in by such executors, and are administered in this country by them under the probate. *Second*, Because in this case the executors having taken possession of the whole of the personal estate and effects of the testator, and having administered the same in this country under and by virtue of the probate, the whole of such personal estate and effects, including so much thereof as was situate in *America* at the time of the testator's death, must be taken and considered as the personal estate and effects for or in respect of which such probate was granted, and

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*House of Lords,* therefore liable to probate duty. *Third,* Because the  
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said respondents, not having paid probate duty upon or rendered an account of any part of the personal estate and effects of the said testator, which were at the time of his death situate in *North America*, and which the defendants, by their demurrer, admitted to consist partly of book debts and other simple contract debts, as alleged by the bill, such demurrer ought not to have been allowed, but that his Majesty's Attorney-General was entitled in respect of such particulars, at least, to a discovery by way of answer, and to an account or inquiry as to such particulars by the decree of the Court.

The demurrer was not argued in the Court of *Exchequer*, but judgment was entered *pro forma* for the respondents, it being understood that the case was to be carried by appeal to the *House of Lords*, for the purpose of reviewing the opinion of the Court of *Exchequer* in the case of the *Attorney-General v. Dimond(a)*.

The *Attorney-General*, (Sir J. Campbell).—This is, in effect, an appeal from the case of the *Attorney-General v. Dimond(a)*. In a case which had occurred previously to that, and in which it was decided that legacy duty is not payable upon the bequest of stock in foreign funds by a testator domiciled in *England*, it was extrajudicially suggested that the same principle applied to the case of probate duty. *Ewin's case(b)*. When the case of the *Attorney-General v. Dimond* came on for decision in the same Court, the Judges found themselves much fettered by the opinion thus delivered, to which, however, they adhered, and decided that such property was not subject to the probate duty. No leave having been given to turn that case into a special verdict, it was not brought into this House on appeal; but this case involves precisely

(a) 1 Crom. & J. 356.

(b) 1 Crom. & J. 151.

the same question, *viz.* whether probate duty is payable upon the goods of the testator that were in *America*, upon his property in the public funds of that country, and upon debts due to him from persons resident there; those goods, stock, and debts having been received by the respondents and administered by them in this country. The first part of the Stamp Act (55 Geo. 3, c. 184, sch. part. 3), bearing upon this question, and by which the duty is imposed, is as follows: "Probate of a will, and letters of administration with a will annexed, to be granted in *England*, when the estate and effects, for or in respect of which such probate, letters of administration &c., respectively shall be granted (exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially), shall be above the value of 20*l.*," &c. By section 37, every person who shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after the decease, &c., shall forfeit 50*l.* Is probate, then, to be taken out "in respect of" the personality of the testator, which, being in a foreign country at the time of his death, is afterwards remitted to this country and administered here? If it be necessary that such probate should be taken out, that cannot be effected without payment of the proper duty. With regard to the necessity of probate, the above provision is decisive; for any person who takes possession of, and in any manner administers, any part of the personal estate and effects of any person deceased, without obtaining probate of the will, &c., is thereby made liable to a penalty. If the testator had died without any personal property in *England*, and his effects, being remitted from *America*, had been administered here without probate, the case would have been clearly within the act; and can it make any

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difference that he dies leaving part of his personality in *England* and part abroad? The 38th section of the act, requiring an affidavit to be made as to "the estate and effects of the deceased, for or in respect of which probate, &c. is to be granted," shews that the whole personal estate and effects are intended to be included. Sections 40 and 41, whereby the duty may be increased or diminished according to circumstances, obviate any difficulty which may arise with regard to the valuation of property abroad. From these provisions, it appears to have been the intention of the Legislature that the property of every person dying shall contribute towards the revenue; first, in the shape of probate, and then of legacy duty; and there is nothing in the act to shew an exemption of property in a foreign country at the testator's death, but afterwards brought to and administered in this country. One mode of trying this question is, to consider whether, without paying the probate duty, the executors could have enforced their title to this property in a Court of law. Suppose that the goods had been remitted in specie to *England*, and had come to the hands of third persons, who detained them, upon which the respondents had brought an action of trover, it is clear, that the moment they put in evidence the probate bearing a stamp for 50,000*l.*, they must have been nonsuited. There are two express authorities on this point, the first of which only was cited upon the argument in the Court of *Exchequer*. The first authority is that of *Lowe v. Fairlie* (a), heard before Sir *Thomas Plumer*, then Vice-Chancellor, a Judge whose decisions are much regarded by those who have succeeded him. There, a testator appointed persons, residing in *England* and *Scotland*, his executors. The will was not proved in *England*. The executors in *India* remitted a sum of money to their agents in *England*, and a

(a) 2 Madd. 101.

creditor of the testator filed a bill against that agent, praying an account and payment of the money to the Accountant-General for security. The defendant demurred, on the ground that no personal representative of the testator was made a party to the bill, and the demurrer was allowed. The point decided was, that, in respect of personal property abroad, when it comes into this country, Courts of equity will not take notice of that property, or listen to the claims of any persons alleging a property in it, till the proper representatives of the party are before the Court—a doctrine which amounts to this, that there must be probate in respect of such property before the Courts of this country can exercise any jurisdiction over it. The decision of Sir *T. Plumer* in *Lowe v. Fairlie* was followed up by that of Sir *John Leach*, then Vice-Chancellor, in *Logan v. Fairlie* (a). There a testator, resident in *India*, and having all his property in that country, bequeathed the residue of his estate to *H. L.*; but if she should die before him, then to her children. *H. L.* died before the testator, and the executor, who was also resident in *India*, proved the will there, and remitted the residue to his agent in *England*, with directions to pay it to *H. L.*, or her children. A suit having been instituted by the children, who were infants, against the executor and his agent, to have the residue secured, the legacy duty was held to be payable upon it: and it was further held, that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit. In the course of his judgment in that case, the Vice-Chancellor says (b)—“ If a part of the assets of the testator is found in *England*, in the hands of the agent of the executor, without any specific appropriation, and a legatee in *England* institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in

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*House of Lords.* *England*, and the legacy duty is payable in respect of them." His Honor then takes a distinction most material to be attended to between the case of assets appropriated out of *England*, and the case where they are remitted to this country unappropriated, as part of the testator's estate, in which latter case the duty is payable. We have, then, the opinion of this learned Judge, that property of the latter description cannot be dealt with in *England*, without a personal representative of the testator in respect of that property.

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There are certainly two cases, an old decision and a modern one, which will be cited on the other side, and which contain a doctrine not quite consistent with, though not contradictory to that laid down in the two decisions just cited. The first is that of *Jauncey v. Seeley* (*a*), reported in *Vernon's Reports*, a book of no very high authority. [Lord Brougham, C.—There is certainly a want of accuracy in that reporter.] That case, supposing it to be correctly reported, may be well distinguished from the present. The circumstances were these:—The plaintiff, as administrator to *J. S.*, who died at *Naples*, brought his bill for a discovery of the testator's personal estate. The intestate had been domiciled at *Naples*. [Lord Brougham, C.—The report does not state that he was domiciled there.] That fact may be gathered from the other parts of the case. The defendant pleaded, that the supposed intestate had made a nuncupative will, in the presence of nine or more credible witnesses, and thereby made the defendant his executor; and that he (the executor) had proved the will, according to the custom of the country where the testator died, and denied that he had left any estate but what was at *Naples*. The Court allowed the plea; and said that the testator having left no estate in *England*, it was not necessary that the will should be proved here. It

does not appear that any part of the property had ever been brought into *England*, or that any *English* diocesan had ever jurisdiction over it. That decision, therefore, cannot affect the present case. The other case is that of *Yockney v. Foyster* (*a*). That was a suit prosecuted in the Prerogative Court of *Canterbury*, by *Elizabeth* wife of *James Yockney*, a legatee, named in the will of *Caleb Foyster*, late of *Jamaica*. The executor, *Foyster*, having appeared under protest to the jurisdiction, it was stated, in the first allegation of *Mrs. Foyster*, that the deceased died in 1777, leaving goods and chattels in divers dioceses. The second allegation stated, that *Foyster*, the surviving executor and residuary legatee, proved the will in *Jamaica*; that he was resident in the province of *Canterbury*, and that, since his having taken upon him the execution of the will, there had been remitted to him, by his agents from *Jamaica*, divers effects above 5*l.* in value, and that he was in possession of them and of divers other effects in the province of *Canterbury*. The third allegation recited the bequest. The fourth stated, that, in order to compel the executor to the due payment of the legacy, the legatee had been advised to file her bill in *Chancery*, but had been prevented from so doing on account of there not being a representative of the deceased in the Prerogative Court of *Canterbury*. The Court is reported to have held, that, in respect of the money remitted from *Jamaica* to *England*, it was not necessary that there should be a representative of the testator in *England*. Upon this case Sir *John Nichol* observes (*b*)—“Sir *William Wynne* said, that, ‘If the Court of *Chancery* had absolutely decided that the prerogative probate was necessary, this Court, in

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(*a*) Cited in *Scarth v. Bishop of London*, 1 Hagg. Eccl. Rep. N.S. 631; 4 Tyr. Burn's Eccl. Law, 233; from Dr. Battine's MSS.  
 (*b*) 1 Hagg. Eccl. Rep. N.S. 636.

*House of Lords,* aid of justice, might allow the grant to pass.' " This is the  
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only grave authority against the doctrine now contended for, and merely amounts to this, that Sir *William Wynne* rejected the allegation upon a mistaken idea, that a Court of equity did not require that there should be a personal representative in respect of the property remitted to this country. Sir *John Nichol* says, that, had it been intimated that the Court of *Chancery* required a personal representative, the Ecclesiastical Court would have granted probate or administration. But of what must it have been granted? Of the property remitted from abroad, with respect to which the testator had made a will, already proved in the foreign country. [Lord *Brougham*, C.—What *locus standi in judicio* has a person, merely by suggesting that he is executor or administrator, without shewing any probate? Probate is the sentence of the Court, and decisive; administration is an original appointment by the Court; probate is the confirmation of an appointment by the party. What *locus standi in judicio* has a person who merely comes and says, " You have the property—I claim a discovery." Can a stranger come into Court and take hold of the property, by suggesting that he is the executor or administrator, or that he is the next of kin? The man should be clothed with a representative character, by the only mode of which we know—a judicial sentence supposed to be passed in open Court, confirming the appointment, or itself making the appointment. The question is, whether, in contemplation of law, when personal property is out of the kingdom, it does not follow the *situs* of the testator?] There are two other cases bearing upon this subject, which shew how far the Courts have gone. In the *Attorney-General v. Cockerell* (a), the circumstances were these:—The testator died in *India*, having made his will there, which was also proved in that country. Some property came into this country, and was unappro-

(a) 1 Price, 165.

priated, and, in respect of it, administration was taken out. So, in the *Attorney-General v. Beatson* (*a*), probate under similar circumstances was applied for and granted. These cases shew, that, at this time, no idea existed that an *English* probate was unnecessary. [Lord Brougham, C.— Those cases were much considered in the case of the *Attorney-General v. Jackson*, which was an appeal from the case of *Jackson v. Forbes*, in the Court of *Chancery*. I sent a case to the Court of *Exchequer* (*b*), and the answer, notwithstanding the *Attorney-General v. Cockerell*, was, that the duty was not payable. In the *Attorney-General v. Jackson*, the testator was domiciled in *India*.] It was considered in that case, that the estate was administered in *India*, and wound up before the money was remitted to this country. A distinction may perhaps be taken between property in foreign funds, and debts due to a testator from persons resident abroad, which may be considered as having been contracted in *England*. But this distinction is immaterial in the present case, in which the question is not, whether probate is to be granted by some particular diocesan, but whether it is to be granted at all, with respect to the property in question. According to the jurisprudence of foreign countries, personal property is considered as following the domicile of the proprietor, and, according to that rule, the testator in this case having had his domicile in this country, his personal property, for the purposes of probate, must be considered as having been situated here. The broad principle is, that personal property follows the owner's domicile. If so, it becomes subject to all the rules affecting personal property, and on his death is liable to be charged with the probate duty.

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Sir George Grey, on the same side.—The question in

(*a*) 7 Price, 560.

(*b*) 2 Crom. & J. 382.

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this case is not, whether, where personal property is situated abroad at the time of the death of a testator, probate duty is payable upon it; but whether, where such property is afterwards brought to this country to be administered, such duty can be demanded. Not only was the testator domiciled in this country, but the executor and the parties taking under the will were all resident here; and the whole administration of the effects takes place in this country. This being the situation of the property, how is the executor bound to act with regard to it? He is a mere trustee, compellable to collect and distribute it according to the course of law. There are two modes by which, if withheld from him, he may recover possession of the property; either by an action at law, or by a suit in equity. But, in order to entitle the executor to maintain such action or suit, he must be clothed with the legal representative character, and that character cannot be conferred unless by probate; nor can that probate be granted without the payment of the required duty. The 37th and 38th sections of the Stamp Act already cited, shew that the personal representative cannot sue without obtaining probate or administration, and consequently without the payment of the duty. The whole course of the proceedings of Courts of justice in this country also demonstrates the necessity for the obtaining of probate. Should a creditor or a legatee sue the executor who has obtained possession of the foreign property, without probate, the Courts here would not recognise his representative character. And, where an administrator procures letters of administration, if too small a duty has been paid upon them, he will not be allowed to avail himself of them in a Court of justice. *Hunt v. Stevens* (a). [Lord Brougham, C.—That case removes my doubt, whether it was not sufficient that the

representative character was once conferred. That decision goes the length of shewing, that, not having the proper stamp, the administrator has no means of proving his representative character at all, and that the instrument has no more effect than if it had not been stamped at all.]

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*Rolfe*, for the respondent.—The duty upon probates was originally granted by the 5 Will. & Mary, c. 51, s. 3, in these words: “for every skin or piece of vellum or parchment, &c., upon which any probate of a will or letters of administration for any estate above the value of 20*l.* shall be engrossed or written, the sum of five shillings.” From time to time, after the passing of that act, various statutes have been made, enacting larger duties, in nearly the same words. In the schedule to the present Stamp Act, the words are—“ Duties on probate of wills, &c. to be granted in *England*, where the estate and effects for or in respect of which such letters of administration, &c. respectively shall be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be &c.” The question is, under this clause, what part of the property of the testator is subject to the duty thereby imposed? It may be stated thus:—A person dies at *Liverpool* or *Manchester*, possessed of property in *England* under the value of 50,000*l.*, but entitled to property in *America* of a much larger amount. In respect of what property is the probate to be granted; is it in respect only of that in *England*, or including that in *America*? To arrive at a proper conclusion, it is necessary shortly to consider the origin of probates and grants of administration; how it is that any probate is granted, and in respect of what the grant is made. Formerly, the Ecclesiastical Court was accustomed to administer the property of persons deceased for the good of the soul; and when this administration was defeated by the operation of

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wills, it was thought very reasonable, as those instruments ousted the Ecclesiastical Court of its privilege of administering the property, it should have jurisdiction over such instruments. Probate, therefore, is only an exemplification or certificate granted by the Court, signifying that they are satisfied that a will has been made, ousting them of their right to administer. The particular jurisdiction which was to grant the probate depended upon the *situs* of the *property*, and such is still the rule. It is almost unnecessary to state the mode in which this rule operates with regard to property left in different dioceses, or different provinces in this country. But suppose that property is left within two dioceses in *England*, and also in *Ireland*; 10,000*l.* in the *English* dioceses, and 10,000*l.* in *Ireland*. The party dies in *England*. Probate, in this case, would clearly belong to the Prerogative Court of *Canterbury*, and, in *Ireland*, (which for the purposes of this argument is a foreign country), probate would also be granted in respect of the 10,000*l.* in that country. What then is the duty imposed by the Stamp Act in such a case? In *England*, upon the amount of 10,000*l.*, and, under the *Irish* Stamp Act, to the same amount. Let it then be supposed that the effects in *Ireland* are brought *per fas aut nefas* to this country; and that the executor is desirous of recovering the possession or the value of them—by virtue of which probate is he to sue? If under his *English* probate, what is the duty which ought to be imposed upon that probate? Or is probate to be again granted in *England*. No distinction can be taken between a probate in *Ireland*, and a probate in *India*. How manifest would be the injustice of making the executor pay the duty twice over? Before examining the cases cited in the argument for the crown, it will be convenient to observe upon the doctrine with regard to the Courts of this country requiring a probate duty to enable the party to sue, and with regard to the

consequences of the want of a proper stamp. [Lord *Brougham*, C.—That has occurred two or three times since I took my seat in the Court of *Chancery*. There was a long cause in which the present Solicitor-General was counsel, which turned on the insufficiency of the stamp.] The objection is a common one, and productive of much injustice; and the decisions upon which it is grounded have never been sanctioned by the authority of the ultimate Court of Appeal. Much inconvenience may result from it. Suppose an action brought by an executor to recover 1000*l.*, due to his testator. At the trial, the probate is produced, and bears a stamp applicable only to 500*l.* It is immediately assumed that too little duty has been paid. But is that assumption correct? It is perfectly consistent with the executor's title and claim that the whole 1000*l.* may be trust money, in respect of which duty is not payable. Was it intended, that the question of the trusts upon which a party holds property, and the mode in which he is to administer it, should be decided *obiter* in an action at law, or upon a new trial, upon which the whole range of questions as to trusts may probably require to be discussed? If there had been no exemption as to probate duty in the case of trusts, the doctrine laid down would be equally objectionable. A party takes out a probate as on 2000*l.*, sues for 1000*l.* due to his testator, and recovers, the probate being perfectly sufficient. He then sues for another 1000*l.*, the probate is still good for that purpose; and so he may proceed *toties quoties*, and recover to any amount, provided the probate be sufficient to cover the sum demanded in each particular case: but if it should happen, that, in one single case, the demand exceeds the sum covered by the probate, then it is said he is not entitled to recover. In the case referred to, of *Hunt v. Stevens*, which may be regarded as very doubtful law, no question arose, as here, with regard to effects out of the jurisdiction; all that was there decided

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*House of Lords.* was, that, when it appeared on the face of the probate  
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that the plaintiff was suing for a larger sum than the duty had been paid upon, he must be nonsuited. No opportunity was afforded in that case of bringing the question before this House on appeal, and it appears to have been decided on a reference to the prohibitory clause in the 9 & 10 Will. 3, c. 25, s. 59, which enacts, that, when a stamp is necessary, no instrument shall be pleaded or given in evidence in any Court, or admitted in any Court to be available therein, unless the vellum, &c., on which such instrument shall be written or made, shall be stamped with a lawful stamp. The Court assumed, that, inasmuch as there was a duty payable on a grant of probate, and it appeared that the matter for which the plaintiff was suing was larger than that for which he paid duty, they could not look at the probate. This appears to be the only decision upon the point. [The Attorney-General.—There is a case of *Carr v. Roberts* (*a*), which came before the Court of *King's Bench*, and was decided in conformity with *Hunt v. Stevens*.] When the first Stamp Act, imposing duty upon probates "for any estate above the value of 20*l.*," was passed, it does not appear that there was any mode provided for ascertaining the value of the estate. [Lord Brougham, C.—It is singular that the act should contain no provision to that effect. The want of it might occasion great hardship. Suppose administration granted of property abroad, which by the law of the foreign country was subject to duty, it would be very hard that the same expense should be again incurred in *England* upon the property being remitted here. If the rule were, that personal property should be subject to the payment of duty wherever it is situated, the difficulty would be removed.] The Legislature in the last Stamp Act intended to remove that difficulty; and, in order to

set at rest all discussion with regard to the value of the property, has, by the 31st section of the act, required such value to be verified by the oath of the party applying for probate, with the view, as it seems, of making such oath conclusive upon the question, unless it should be made to appear that he has been mistaken, and that either too much or too little has been paid, in which case there is a very elaborate piece of machinery provided for the purpose of correcting that mistake. [Lord *Brougham*, C.—The 43rd section inflicts a very severe penalty in case of any fraud upon the act; but you contend, that, until the mistake is rectified, the value sworn to is conclusive. The counsel for the Crown may admit that position, but the present proceeding is for the purpose of trying whether or not the stamp ought to be rectified, by including the *American* property.] The facts in the *Attorney-General v. Dimond* are altogether the same as those of the present case. [Lord *Brougham*, C.—I cannot regard the *Attorney-General v. Dimond* as a decision of authority. It appears, that the Crown, feeling that the judgment of the Court of *Exchequer* might have been disputed, had the state of the record permitted it, brought forward the present case in a shape in which an appeal might be sustained. *Ewin's case* is of greater weight, from the circumstance of its never having been made the subject of appeal. The *Attorney-General v. Dimond*, on the contrary, was never acquiesced in for a moment. Undoubtedly, the judgment of the Court, in the latter case, is deserving of the greatest deference and respect; but the question which must now be decided is, whether the judgment of that Court was right or wrong. That the appeal should be from four Judges to one is a source of sincere regret to me; but that defect in our jurisprudence will, I hope, be remedied ere long. I should be glad that you would consider the following point in your argument, as it presses a little upon my mind. The Stamp

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Act ought to be so construed as to prevent its provisions, if possible, from being evaded. Now, supposing the rule laid down by the Court of *Exchequer* to be correct, would it not be in the power of individuals to escape from the payment of the probate duty? It would be easy for a person in the course of a long illness to transfer from our own funds, into the stock of some foreign country, the whole of his property, and then, dying domiciled in this country, and his executors too residing here, no duty would be payable. The late Mr. *Adam*, according to that doctrine, might have saved the payment of the duty, and the government would have lost the probate duty. It is always an argument against any particular construction of an act of Parliament, that such a construction would prevent the act from being effectual.] The case, *In re Ewin*, is very important, not as a decision with regard to the present question, but as shewing the course which the learned Judges thought themselves bound to take. In deciding that legacy duty was payable on foreign property, they appear to have distinguished their judgment from what it would have been had the claim been for probate duty. Lord Chief Baron *Alexander* says (*a*), "Upon what grounds is it contended that this estate is not liable? Because the duties on probates and administrations would not have extended to this particular fund. This argument does not appear to me to make any difference in the case. By the act of Parliament the duty on the probate is only imposed in respect of that fund which the executor is to obtain in a particular province of this country, by force of that probate. If there be personal estate in the provinces of *York* and *Canterbury*, and probate be taken in *York*, the duty is paid upon the property in that province only; and it is not paid upon the other property until a probate is taken in the province of *Canterbury*. This is made

apparent by the very terms of the act; for it says, where the estate and effects, for or in respect of which such probate, letters of administration, or confirmation respectively shall be granted or expedited—evidently confining the charge upon the probate to those particular estates to be received by force of that administration. But when it speaks of the *legacy* duty, it is charged upon the amount of the estate itself, to be handed over upon the receipt, which the executor, to save himself from the penalty, ought to take before he pays the money. I cannot doubt, therefore, in this particular case, that the legacy duty is chargeable." Mr. Baron Bayley, in the course of his judgment in the same case (*a*), says, "The rule as to probates has been pressed on our consideration, and the difference between those things *bona notabilia*, and those things not *bona notabilia*. The question as to *bonum notabile* is essential only to ascertain the *situs* of the property, and to ascertain, with regard to probate, out of what limits the power, which is to clothe the executor with the means of acting upon it, shall issue. And it is *bonum notabile* in one place or another according to its *situs*. But *Bruce v. Bruce* decides that the *situs* determines nothing in a case like the present; for the executor has the power of removing the property from its *situs*, and getting it into his own country. Now the probate duty is only with reference to the *situs* of the property within the limit of the probate."

*Ewin's case* was decided at the close of the year 1830, and in the following year the case of the *Attorney-General v. Dimond* was discussed, in which the question as to probate arose. In the argument of that case it was pressed, as it has been pressed here, that, in order to sustain an action in this country, a probate in this country was neces-

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*House of Lords*, sary; and the authority of *Logan v. Fairlie* was much relied upon. It may be admitted, that, in order to sue in the *English* Courts, the party must be clothed with a representative character; but the question here is, what tax he must pay before that character can be conferred. This brings the argument once more to the construction of the Stamp Act, which says, that the duty is payable upon the estate or effects for or in respect of which such probate, letters of administration, &c. shall be granted, or whereof inventory shall be exhibited, &c. In respect of what estate are the letters of administration or probate granted? In respect of the property in *America*, as well as of that in *England*? If so, what probate duty was payable at the moment of administration? It is true the probate duty may be increased, if it afterwards appear that too little has been paid; but that is only in case of mistake. The Legislature assumes that the party knows at the time upon what amount of property the probate duty is to be paid. But, if the foreign property is administered in the foreign country, it is not contended that the duty would be payable upon it. And how can the executor tell whether it will ever be brought to this country? If the probate duty was rightly paid at the time of the grant of probate, there is nothing in the act authorizing a change of the stamp in consequence of occurrences subsequent to that period. Suppose a person dies, leaving no property, or property under 20*l.*, in this country, but having 100,000*l.* in *India*. Suppose 500*l.* only of that sum is transmitted to *England*—upon what amount is the probate duty payable? What is there in the Stamp Act applicable to a case like this? In requiring the oath imposed by the last Stamp Act, it is quite clear that the framers of that statute treated the value of the property for or in respect of which the probate was to be granted as a fact capable of being ascertained at the time of the probate being granted. [Lord *Brougham*, C.]

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—I have always considered that personal estate follows the domicile of the owner.] Not in all cases; thus, if A. die in the diocese of *Norwich*, and his debtor is resident in another diocese, probate must be granted in the latter. [Lord *Brougham*, C.—That rule governs the granting of particular or general administration. Yet, notwithstanding it may be requisite, to give a general jurisdiction, that there should be *bona notabilia* within some district, when once the Court has got jurisdiction, the grant may have universal effect with reference to the will. The grant, though made in respect of particular goods, will enable the executor or administrator, when he comes into the Court of *Chancery*, to call the foreign funds home and to distribute them here.]

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*Wigram*, on the same side.—The question for the decision of the House may be stated thus:—An act of Parliament was passed, giving the Crown a right to certain duties. That act confers upon the Crown whatever title it possesses; and from that act alone the rule governing the present question is to be taken. The act defines both the right of the Crown and the liability of the subject; it imposes severe penalties, and is therefore to be construed strictly. An attempt has been made to shew that the question of probate duty is analogous to that of legacy duty; with regard to which it has been decided in *Ewin's case* that the domicile of the owner governs the *situs* of the property. The same rule was laid down in *Bruce's case* (a), which, in its circumstances, was the reverse of *Ewin's case*, the owner in the former case being domiciled in *America*, and the decision consequently being that the legacy duty was not payable. But what analogy is there between those cases and the present? The distinction will appear upon

(a) 2 Bos. & Pul. 229, n.

*House of Lords,* a comparison of the two acts imposing the several duties.  
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By the Legacy Duty Act, 36 Geo. 3, c. 52, s. 2, it is enacted, that, "upon every legacy, specific or pecuniary, or of any other description, of the value of 20*l.* or more, given by any will or testamentary instrument of any person, who shall die after the passing of that act, such a duty shall be paid. The act, therefore, imposes the duty upon a certain class of persons, and the Legislature must be supposed to have contemplated only persons domiciled in this country. It was the persons who were to take, and not the particular property taken, that the Legislature had in view. But the words of the 55 Geo. 3, c. 154, which imposes the duty on probates, are wholly different; and the intention of the Legislature is different also. The language of that statute does not refer either to the person of the testator or to his domicile; but it imposes the duty upon *the estate or effects* for or in respect of which the probate is granted. What the estate and effects are upon which the duty is thus imposed is only to be known *aliunde*. This is matter entirely of ecclesiastical cognizance; and, from the decisions of the Ecclesiastical Courts, it is that we are to learn in respect of what estate and effects probate is properly to be granted. The rules of these Courts are laid down in the case already referred to of *Yockney v. Foyster* (*a*), from which it appears that probate is never granted except in respect of property situated within certain local bounds. With regard to administration, it is clear, that, where a person died, there was an original right in the ordinary to take possession of the property locally situate within his own diocese, while another ordinary had a similar right; but, in order to enable an executor to entitle himself to the whole, the Prerogative Court was authorized to confer a title in such a case. But that does not

(*a*) 1 Hagg. Eccl. R., New Series, 636.

alter the principle, that, properly and strictly, probate is only granted in respect of the property situated within the diocese. Probate is granted for the purpose of indicating to the common-law Courts, and to the rest of the world, that the ordinary has resigned his pretensions to administer the effects; and it is granted precisely in respect of the same effects which would otherwise have been distributed by the ordinary under his original jurisdiction. [Lord *Brougham*, C.—You are putting the question very properly, and, at the same time, very artificially and technically. In early times, it is clear, that the right of the ordinary did not always depend on local situation. If a man died, leaving debts due to him abroad, the ordinary would probably have levied those debts.] There appears to have existed no means by which the ordinary would be enabled to possess himself of property out of his jurisdiction. The original rule of the Ecclesiastical Courts with regard to administration is that which ought to govern the present case—that the situation of the property at the time of the owner's death is to govern the grant of probate. Were this not the case, the injustice might follow of the executor being compelled to pay probate duty twice. This is the point to which the Judges refer in the *Attorney-General v. Dimond*. The only reason why the Courts of common law and of equity require that a party claiming as executor should produce his probate is, that they may be assured that the Ecclesiastical Court has renounced its right to administer the effects of the deceased, and not with the view of ascertaining whether the party has paid the proper amount of duty. They are satisfied upon its appearing that he has been properly invested with the representative character. [Lord *Brougham*, C.—The result of the case of *Hunt v. Stevens*, and the other case which was mentioned, is this:—The Courts, in such cases, say—It is true you are clothed with the representative character; but it

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is only to the extent to which you have paid the duty. You cannot ask for more than the amount. If you do, you are suing in a character which is not conferred upon you.] Those cases do not affect the present question, unless it be assumed that probate duty is in fact payable upon foreign property, which is the very point in debate. Nor is the other position more material, that Courts of equity require that the representative shall be before the Court, and that they will receive no other evidence of a person sustaining that character but administration or probate. But does it follow that the Courts require the duty to be paid upon such administration or probate before they will admit them in evidence? Certainly not; for there are cases in which the probate requires no duty, as in the case of a term which has vested in the executor as such. It is not, therefore, a necessary consequence of probate or administration being required, that the duty should be paid. There is nothing inconsistent in the Courts requiring probate to be granted, and yet not requiring that the duty should be paid.

The Attorney-General was heard in reply.

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LORD CHANCELLOR.—My lords, in considering this case, which comes by appeal from a decision of the Court of Exchequer, it is necessary that I should remind your lordships, as I did on a former occasion, of the *Attorney-General v. Jackson*. This is a decision by a Court entitled to the greatest respect, not merely in reference to the matters which more ordinarily come before the Courts of this country, but in reference particularly to matters of revenue, inasmuch as the jurisdiction which the constitution and the law of this country have given leads them especially to the handling questions of this description. It was upon that ground I felt, though there were certain doubts in

my mind on a comparison of the cases of the *Attorney-General v. Cockerill*, the *Attorney-General v. Beatson*, and other cases, with the decisions of the Court in *Forbes v. Jackson*, which was a case from the Court of *Chancery*, that it must be, as I stated, a very clear opinion, and one very confidently entertained, and without any hesitation, that should entitle me, and therefore incline me, to advise your lordships to differ from that Court on a solemn judgment, delivered after hearing all which could be urged on both sides. Nevertheless, your lordships are bound in this as in all other cases to judge for yourselves, as the Court below were bound to judge for themselves; and if, on serious consideration, I cannot bring my mind to think that they have well decided this case, it will be my duty to represent that to your lordships. I shall, therefore, my lords, take time to consider the arguments which have been urged, to examine the statutes and the authorities, and to make inquiry of the very learned civilians at the head of the Ecclesiastical Courts, upon some matters which have been brought into discussion in argument here, but which do not appear to have been touched upon in the Court below. It is not a very elaborate judgment; nevertheless the question is put, in the mode of stating it, on its right footing. The learned Chief Baron in giving judgment, which I understand to have been delivered after taking time to consider, lays it down, and that is clearly right, that the whole question is, whether, in respect of those 300,000*l.*, or any portion of that amount, a probate was granted. If it was granted in respect of that money, *cadit quæstio*—clearly probate duty is payable; if it was not granted in respect of that money, the subject is at an end on the other side, and the duty is not payable. The learned Attorney-General agrees that this was the right way of putting it; but he attempts to limit that by the pleadings, and has recourse to an argument

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in which I do not go along with him, though I do in a great deal of his argument, as to the locality or non-locality, and the shifting nature of personal property in general. He says, look at the information, and you will see the demurrer confesses the facts; you will see by the information it is alleged, and therefore, by the force of the demurrer, must be taken to be admitted, that it was in respect of this probate, or by force and effect of it, that possession of this *American* fund was obtained by the party; therefore, says he, it follows that the probate was granted in respect of that foreign fund. My lords, I do not go along with him in that view of the case. It may very easily be conceived that the probate was granted in respect of goods and chattels locally situate within the bounds of the ecclesiastical jurisdiction, and in respect of nothing else; but that the probate, so granted to that limited extent, may have been used elsewhere for another purpose, and with respect to other property out of the ecclesiastical jurisdiction; so that, by means of probate granted *alio intuitu* by the Ecclesiastical Court, the possession of the estate and effects situate abroad may have been obtained, though it was not in respect of that foreign property that the probate was granted. But, assuming the fact of a probate being used for one purpose abroad, though it was granted for another at home, it does not by any means follow, that the person possessing the probate, having used it for the purpose of getting in a foreign estate, and being enabled by that means to get in that foreign estate, must be said to have obtained it for the sake of getting in that foreign estate. This, my lords, is not decisive at all of the question; I throw it out for the purpose of disembarrassing the *case* of that argument—it will not be on that I shall propose to your lordships to decide against the judgment of the Court below. I shall feel it my duty to consider the *case*

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with great anxiety before I come to a conclusion. I was very much impressed with the argument as to the nature of the probate granted by the Ecclesiastical Court, and the ground for granting it as connected with the jurisdiction of that Court. If I could be satisfied that at any time the Ecclesiastical Court has so far taken into its view goods or personal estate of a testator or an intestate locally situate beyond its jurisdiction; that, after the period of its having granted probate, for instance, or before probate was granted, when it was administered *in pios usus* for the safety of the soul, as it was called, it could be shewn that the bishops had drawn over to the same uses property out of their own jurisdiction; that, having possessed themselves of that within their grasp at the time of the death of the party, they had afterwards extended that grasp abroad, so as to get hold of that which, at the time of the death, was not within their jurisdiction, and had taken that from themselves—that would go a very great way in support of the Attorney-General's argument, and would be almost conclusive, as it would almost entirely displace the very ingenious arguments of Mr. Rolfe and Mr. Wigram. This is a matter, not merely of antiquarian curiosity—it bears most materially upon the case, and it is one of those which I shall take care to inquire into; and happily I have the best means of prosecuting that inquiry, by ascertaining the opinion upon it of men of very great learning and experience—the learned Judges in the Ecclesiastical Courts. I shall communicate with them upon that subject, and ascertain their opinion of the extent of ecclesiastical jurisdiction in former times. But, if I shall find that the Ecclesiastical Court had not jurisdiction over property beyond its own limits, there will arise another difficulty, which is referred to by the Attorney-General, who says, if the ordinary did not get the property, what became

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of it? It was not *bona nullius*, it was not *bona vacantia*—whom did it go to, if it did not go to the ordinary *pro salute animæ*? I suppose it will not be said that it belonged to the lord of the manor; it would be ridiculous to talk of that. It will not be said that it belonged to the Crown. I never heard of its being considered as mere *bona nullius* or *bona vacantia*; there must be some administration, some mode of dealing with it; and if that is not of a local nature; if it is not limited by the extent of the diocesan's jurisdiction, who assumed to administer in those days, and subsequently has granted probate to the executor, confirming the appointment of the deceased, or letters of administration appointing the individual to discharge the duty in relation to that property, the difficulty is to see to whom the property devolves. My lords, these are the points I wish to look into, and I shall do so most carefully, because, though the case depends much upon them, they do not appear to have exercised the ingenuity and called forth the learning of the counsel below, or to have received any adjudication, or I may say any consideration from the learned Judges of the Court below. So far as I can perceive, they appear not to have been argued—certainly they appear not to have been decided by any of the learned Judges, or to have formed any ingredient in their decision. The decision was given by the Lord Chief Baron alone; it was given by him after time taken for consideration; whether it was pronounced verbally, or whether it was in writing, is quite immaterial—a judgment delivered by the head of the Court, after time taken for deliberation, must, as it is said, be taken to be the judgment of the whole Court. Mr. Baron *Bayley*, it appears, did take a part, throwing out in the course of the argument various interlocutory remarks, some of which are valuable. I have looked at them with reference to the Lord Chief Baron's judgment—they bear the marks

of his well-informed and acute understanding; and I think I can trace the reasoning of Mr. Baron Bayley in that judgment. From my long experience of that very learned and acute Judge, acute in all matters, and particularly in this kind of argument, if I may say so, it appears to me to bear strong marks of being substantially his judgment. The bias of that learned Judge's mind, and the direction which it had received in reasoning on the question, at all events greatly influenced the disposal of the case. My lords, I shall take every means in my power of informing myself, before I move your lordships to proceed to judgment, whether probate is to be considered as limited or unlimited, restricted to the personal estate of the testator in the diocese at the time of his death, or otherwise. The case may very probably, if not altogether, depend upon the inquiry which I have stated; I mean as to what was formerly the case in respect of jurisdiction, and the mode in which the Ecclesiastical Court dealt with such subjects in a foreign country at the time of the individual's decease. Upon these grounds, therefore, I shall move your lordships that the further consideration of this question be postponed.

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Further consideration postponed.

**LORD CHANCELLOR.**—The next case to which I have to call your lordships' attention, and the last upon the present occasion, is the case of the *Attorney-General v. Hope*. This was an appeal from an unanimous decision of the *Exchequer*, upon an information filed by his Majesty's Attorney-General for the purpose of obtaining payment of probate duty in respect of assets of the testator, which, at the time of his decease, were situate without the jurisdiction of the Court. When the case was argued, I entered at some length into the subject and the reasons on both sides; and stated, that I could not agree with the argument urged

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by the Attorney-General; and that I did not think that the use that had been made of the probate was a test of itself sufficient to demonstrate the purpose for which the probate had been granted. The words of the act refer not to the use eventually made of the probate, but distinctly to the purpose for which the probate was granted. The words of the schedule are to be the rule upon the present occasion; and they do not appear to me to shew, that, though the probate has been eventually, *de facto*, made available to collect foreign funds, that circumstance is any test whatever in trying whether or not this case of foreign funds comes within the schedule.

My lords, it appeared to me, that much must depend upon the course of practice of the Ecclesiastical Courts in matters of probate, and whether they assume a jurisdiction co-extensive with the estate of the deceased party whose will is brought for proof. If they assumed to deal with the property, or in any way to hold it as within their reach and grasp, then it might be said that the probate attached to the property wheresoever situated, and that it bore relation to the property, and that it was granted in respect of that property, and the duty would attach. But, my lords, if on the other hand it should be found, that, in fact, the probate was merely granted in respect of the personality at the time of the death in the ordinary's jurisdiction, then *cadit quæstio*; for, by parity of reasoning, this is not a case that comes within the words of the schedule, and consequently no probate duty attaches. Now, it was maintained, and I dwelt upon this argument when the case was last before your lordships, and I think it was justly maintained, that probate was granted by the ordinary in former times in consequence of the interest that he had in the personality of individuals, to be applied to pious uses for the safety of the souls of those individuals. That is probably the origin of grants of administration, by which

the clergy obtained great influence. The pious uses they applied them to it is now needless to inquire into. But from that arose the question with which we have now to deal, and upon which the present case turns; for, the relinquishing of the right to the property, and a vesting of it in the administrator or the executor, by granting probate with the will annexed, or granting administration if there was no will, was the origin, in later times, of the claim of the ordinary to vest in other parties the powers previously exercised by himself.

Now, if the ordinary could only lay claim to the goods of the party in his jurisdiction at the time of his death; if he never thought of calling for foreign funds, and making his claim to them for pious uses, merely because the party died in his jurisdiction, it clearly appears that the probate could not be granted, except in respect of those goods which were in his jurisdiction; and if so, the probate duty cannot attach, and there is a clear omission in the statute. I believe that the framers of the act meant that it should attach; but, if the Legislature has used insufficient language for the purpose, the payment cannot be enforced.

I have made inquiry of two very learned authorities, and I have also referred to the King's Advocate, and they entirely corroborate my view with regard to the confined and restricted jurisdiction, the nature of the ordinary's office, and the goods in respect of which probate is to be granted. That of itself would be a strong ground for affirming the decision of the Court below. But I will not conceal from your lordships that I have another reason that operates very strongly on my mind: unless it was quite clear that there had been a miscarriage below—and I used the same argument in the *Attorney-General v. Jackson*, with the perfect concurrence of the Lord Chancellor of Ireland—unless there was a clear miscarriage below, I

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should hold it would not be advisable to shake the decision of the Court of *Exchequer* upon a revenue question; to shake a decision unanimously pronounced after great deliberation, and full argument, and time taken to consider, by one of the Judges on behalf of his three brethren. To shake their decision upon a revenue question, which is a kind of matter that more especially belongs to that jurisdiction, I think eminently unadvisable. Without saying that the case is free from difficulties, and without saying that there are things that are not explained, and some dicta which conflict with each other upon the subject, yet those dicta are not sufficient to induce me to shake the decision of the Court below—they furnish no ground for a reversal; and upon the whole, I recommend to your lordships to affirm the decision, but to affirm it without costs.

Judgment below affirmed, without costs (2).

(a) The subject of the *situs* of personal property in a foreign country, and the rights of the representatives of the deceased owner with respect to it, has been frequently discussed in the American Courts. The authorities will be found appended to the following passages of Mr. Justice Story's Commentaries on the Conflict of Laws.—“In regard to moveable estate a like rule may not necessarily prevail in foreign countries, governed by a jurisprudence which is drawn from or modelled upon the civil law; for moveables, being treated as having no *situs*, and to be governed by the law of the domicil of the testator or intestate, the title of the heir taking its effect directly from that law, is, or at

least may be consistently held to carry the right to such property, wherever it may be locally situate, in the same manner as it would by an assignment by the owner *inter vivos*. (2 Kaines' Equity, B. 3, c. 8, s. 4.)

“Lord Kaines seems to make a distinction between the case of a testamentary heir and an heir by intestacy, asserting that the nomination of an executor (*haeres de mobilibus, or haeres fiduciariae*) (Ersk. Inst. B. 3, tit. 9, s. 2, 26,) by the proprietor in his testament, as to moveables, is effectual all the world over *jure gentium*, and will be sustained in Scotland, whereas letters of administration in a foreign country are strictly territorial, and, when granted in a

foreign country, are not recognised in Scotland unless they are confirmed there by a proper judicial proceeding. (2 *Kaines' Equity*, B. 3, c. 8, s. 3. *Id. s. 4.*) It may be so; but Erskine lays it down as clear law, that in Scotland neither executors nor administrators, foreign or domestic, are entitled to administer the estate of the deceased until they have been duly confirmed by the competent Judge. (*Ersk. Inst. B. tit. 9, s. 27, 29.*) What, perhaps, Lord Kaines meant to say was, that the title of executor was a good title *jure gentium*, and, when established in the manner and by the process prescribed by the law of the place where it was sought to be exercised, ought to be held of universal obligation. And so it probably is in all civilized nations, except such (if there now are any) as adopt the *droit d'ubaine*, and confiscate the moveable property of all foreigners dying and leaving such property within their territories.

"In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot de jure extend as a matter of right beyond the territory of the government which grants it, and the moveable property therein. As to such property situate in foreign countries, the title, if acknowledged at all, is acknowledged ex comitate; and of course it is subject to be controlled or modified

as every nation may think proper, with reference to its own institutions and policy, and the rights of its own subjects. And, here, the rule, to which reference has been so often made, applies with great force, that no nation is under any obligation to enforce foreign laws prejudicial to its own rights, or those of its subjects. Persons domiciled, and dying in foreign countries, are often deeply indebted to creditors living in other countries, in which they have personal assets. In such cases it would be a great hardship upon such creditors to allow a foreign executor or administrator to withdraw those funds without the payment of such debts, and thus to leave the creditors to seek their remedy in the domicil of the foreign executor or administrator, and, perhaps, there meet with obstructions and inequalities, in the enforcement of their own rights, from the peculiarities of the local laws.

"It has hence become a general doctrine of the common law, recognised both in England and America, that no suit can be brought by or against any foreign executor or administrator in the courts of the country, by virtue of his foreign letters testamentary or of administration; but new letters of administration must be taken out and new security given, according to the general rules of law prescribed in the country where the suit is brought. (The authorities to this point are now exceedingly numerous and entirely conclusive. See *Lee v.*

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*Moore, Palm.* 163; *Tourton v. Flower*, 3 P. W. 369, 370; *Thorne v. Watkins*, 2 Ves. 35; *Att.-Gen. v. Cockerell*, 1 Price, 179; *Lowe v. Fairlie*, 2 Madd. 101; 1 Hagg. Eccl. R. 93, 239; *Mitford's Ple.* 177 (4th ed.); *Fenwick v. Sears*, 1 Cranch, 259; *Dixon's Executors v. Ramsay's Executors*, 3 Cranch, 319—323; *Kerr v. Moon*, 9 Wheaton, R. 565; *Armstrong v. Lear*, 12 Wheaton, R. 169; *Thompson v. Wilson*, 2 N. Hamp. R. 291; *Dickinson's Administrators v. M'Craw*, 4 Randolph, R. 158; *Glenn v. Smith*, 2 Gill. & John. R. 493; *Stearns v. Burnham*, 5 Greenleaf, R. 261; *Goodwin v. Jones*, 3 Mass. R. 514; *Borden v. Borden*, 5 Mass. R. 67; *Stevens v. Gaylord*, 11 Mass. R. 256; *Langdon v. Potter*, 11 Mass. R. 313; *Dangerfield v. Thurston*, 20 Martin, R. 232; *Riley v. Riley*, 3 Days' Conn. Cas. 74; *Champlin v. Tilley*, Id. 303; *Trecothick v. Austin*, 4 Mason, R. 16—32; *Ex parte Piquet*, 5 Pick. 65; *Holmes v. Remsen*, 20 John. R. 222—265; *Smith. Administrato-*

*tor, v. The Union Bank of Georgetown*, 5 Peters, R. 518; *Campbell v. Toussy*, 7 Cowen, R. 64; *Logan v. Fairlie*, 2 Sim. & Stu. 284). The right of the foreign executor or administrator to take out such new administration is usually admitted as a matter of course, unless some special reasons intervene, and the new administration is treated as merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. (*Harvey v. Richards*, 1 Mason, R. 381; *Stevens v. Gaylord*, 11 Mass. R. 256; *Case of Miller's Estate*, 3 Rawle, R. 312). Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees resident within the country, and the residuum is transmissible to the foreign country only when the final account has been settled in the proper domestic tribunal, upon the equitable principles adopted in its laws."—*Conflict of Laws*, 421.

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## EXCHEQUER OF PLEAS.

STEIN and Another v. YGLESIAS and Others.

**ASSUMPSIT.**—The *first* count of the declaration was upon a bill of exchange, drawn by one *Juan Ettevan de Apalatequi*, dated the 22nd of January, 1833, upon the defendants, payable six months after date, to the order of one *Alexander Douglas*, for 230*l.* sterling value in account, and to place the same to account. The declaration then stated, that the bill was accepted by the defendants, and indorsed by *Alexander Douglas* to the plaintiffs. The *second* count was upon a similar bill for 360*l.*, accepted and indorsed like the bill mentioned in the first count. The third count was on another bill for 200*l.*, payable four months after date, accepted and indorsed in the same manner. The *fourth* count was upon an account stated. The defendants pleaded, *first*, that *Juan Ettevan de Apalatequi* did not make the bills of exchange mentioned in the declaration; *secondly*, to the first, second, and third counts, that the bills were accepted at the request of and for the accommodation of the said *Alexander Douglas*, and without any consideration whatever for the said acceptance thereof; and that they were indorsed to the said plaintiffs after the same and each of them had become due and payable. The defendants pleaded, *thirdly*, that the bills were indorsed after they became due and payable; and that, before the indorsement, the said *Alexander Douglas* was indebted to the defendants, upon the balance of an account between them, in a large sum of money, exceeding the amount of the bills of exchange. To the second and third pleas there was a demurrer, and joinder in demurrer.

To a declaration on certain bills of exchange by the indorsees against the acceptors, the defendants pleaded, *first*, that the bills were accepted for the accommodation of the indorser, and without any consideration for the acceptance; and that they were indorsed to the plaintiffs after they became due: *secondly*, that the bills were indorsed after they became due; and that, before the indorsement, the indorser was indebted to the defendants in a sum of money exceeding the amount of the bills:—*Held*, that the pleas were ill, but the Court gave the defendants leave to amend.

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*Barstow*, in support of the demurrer.—The last plea is clearly bad, upon the authority of the recent case of *Burrough v. Moss* (*a*), which establishes that a right of set-off cannot prevail against an indorsee subsequent to the bill becoming due, unless the subject-matter of the set-off was in connection with the bill. No such connection is suggested in this plea, which merely shews a right of cross-action in the defendants against the first indorser. Then, as to the second plea:—The defendants probably wished by this plea to raise the important question to what extent must a person, sued upon a bill, cast suspicion upon it before he is entitled to call upon the plaintiff to prove consideration? But, if the defendants intended to raise this question, they have not done so by their plea. The case of *Charles v. Marsden* (*b*) shews that the facts of want of consideration and indorsement after the bill became due, do not, when pleaded, make up a defence at law. The defendant must go on to aver that the plaintiff gave no consideration. Upon whom would be the burthen of proof on the trial may be a different question. But, when the plea professes to supply an answer to the action, it must aver the affirmative, and the negative of every fact necessary to destroy the right of action. The cases on this subject, which have hitherto occurred, were chiefly under the general issue, when that plea was allowed in answer to an action on a bill of exchange; and consequently the present question as to the sufficiency of the plea would not, in those cases, arise. When the question is properly raised, the plaintiffs will contend that the opinion of *Parke, J.*, in the case of *Heath v. Samson* (*c*), is the correct one. (He was then stopped).

PARKE, B. (to *Hoggins*, who appeared for the defen-

(*a*) 10 B. & C. 558.    (*b*) 1 Taunt. 224.    (*c*) 2 B. & Adol. 291.

dants.)—You do not even state that the bill was accepted before it became due. An accommodation acceptor might, to assist his friend, accept such a bill. There is nothing whatever to lead to a conclusion that the defendants intended to limit the negotiation of the bill to the time before it became due. You had better amend, and plead all the necessary facts to exclude a right in the person accommodated to negotiate the bill after it became due. The last plea is certainly bad on the authority of the case of *Burrough v. Moss*.

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*Hoggins* accordingly elected to amend, on payment of costs.

#### NURSE v. GEETING.

**ALEXANDER** had obtained a rule in this case to set aside the judgment and subsequent proceedings for irregularity, on the ground that the defendant was entitled to an imparlance, for which he cited *Frean v. Chaplin* (*a*), in which Mr. Justice *Taunton* decided, that, when the plaintiff declares in vacation, the defendant is entitled to an imparlance.

Impariances are abolished by the Uniformity of Process Act.

*C. Jones* shewed cause.—The case of *Frean v. Chaplin* has been doubted by several of the Judges, and is not to be reconciled with the provisions of the Uniformity of Process Act (*b*), which enacts, that, if any writ of *summons*, *capias*, or *detainer*, issued by the authority of that act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as therinafter provided, be

(*a*) 2 Dowl. P. C. 523.

(*b*) 2 W. 4, c. 39, s. 11.

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had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation.

**PARKE, B.**—I always considered that the effect of the Uniformity of Process Act was to do away with imparlances; but, as there has been a decision upon this point in the Court of *King's Bench*, we will speak with the Judges of that Court on the subject.

On the following day, **PARKE, B.**, said—We have consulted the Judges of the other Courts, and we are all of opinion that, since the Uniformity of Process Act, imparlances are done away with, and that proceedings, both in term and vacation, are to take their course without any imparlance. As there is no reason to doubt the correctness of the report of the case cited to us, on the authority of which this application was made, the rule may be discharged without costs.

Rule discharged without costs.

#### HEMMING v. ENGLISH.

Where the defendant permitted the examination of an incompetent witness for the plaintiff to proceed, on the plaintiff's attorney undertaking to produce a release after the trial, his refusing so to do is no ground for a new trial.

**CASE** against the defendant for negligently driving his gig against the horse of the plaintiff, whereby it was killed. Plea—the general issue. At the trial, before *Williams*, J., at the last *Summer Assizes* for the county of *Worcester*, the only witness called on the part of the plaintiff was a person named *Wilson*. It appeared that the plaintiff having let the horse to hire to a person of the name of *Hancock* to go to *Droitwich*, *Hancock* employed *Wilson* to take the horse back to *Worcester*, and, while *Wilson* was driving, the accident in question occurred.

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He was objected to on the ground of interest, to which it was answered, that the objection was removed by the 2 & 3 Will. 4, c. 42, s. 27; but the learned Judge thought him incompetent. It was then proposed to release him; and, in order to save time, there not being a release stamp in Court, the counsel for the defendant consented that the cause should proceed, the plaintiff's attorney undertaking to procure the release after the trial. The witness was then examined, and the plaintiff had a verdict. After the trial, the attorney for the plaintiff was called upon to perform his undertaking, which he refused to do.

*F. V. Lee* now moved for a new trial, on the ground of a breach of good faith. It was a fraud upon the Court, and the witness must be considered as never having been examined. He spoke under a conviction that he was released in law. It was a conditional examination, and, the condition not having been performed, the evidence ought to be struck out. The plaintiff himself, also, was a party to the fraud, for he was present at the trial.

**Lord LYNDHURST, C. B.**—How can the undertaking to give a release to a witness affect the verdict of the jury? It is a matter resting entirely between the defendant and the plaintiff's attorney.

**PARKE, B.**—You import the term "condition" into the case; but in fact there was no condition in the transaction. The trial was to proceed, and after it the plaintiff's attorney was to give the release. The remedy is upon that undertaking.

**ALDERSON, B.**—The witness gave his testimony under the impression that he was released. That is sufficient.

Rule refused.

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The ATTORNEY-GENERAL *v.* CLAUDE VONDIERE.

The statute 3 & 4 Will. 4, c. 52, s. 20, enacts, that goods taken or delivered out of any warehouse, not having been duly entered, shall be forfeited.

The King's Warehouse is a warehouse within this clause.

By stat. 3 & 4 Will. 4, c. 53, s. 28, if goods, which shall have been warehoused or otherwise secured for home consumption or exportation, shall be clandestinely removed from or out of any warehouse or place of security, they shall be forfeited.

Quare, whether the King's Warehouse is within this clause?

THIS was an information grounded on the statutes 3 & 4 Will. 4, c. 52, ss. 17 and 20, and c. 53, s. 28. The first count stated, that W. P. and J. F., officers of customs, after the 28th August, 1833, and before the day of exhibiting the information, to wit, on the 4th September, 1833, did seize and arrest, to the use of his Majesty and of themselves, as forfeited, several parcels of silk waist-coats, &c. of the goods and chattels of persons unknown; for that divers merchants, whose names are as yet to the said Attorney-General unknown, did heretofore, to wit, on &c., import, or cause to be imported, into the United Kingdom, to wit, at &c., 132½ ells of velvet, &c., the said goods and merchandize being at the time of the said importation thereof liable to the payment of duties of customs to his Majesty, and that the said goods and merchandizes were afterwards deposited and secured by certain officers of the customs, for security of such duties, *in a certain warehouse in the United Kingdom, that is to say, in London, commonly called the King's Warehouse, at the Custom House;* and that the said goods and merchandize, so deposited and secured in such warehouse for the security of such duties, were afterwards, and without the payment of the duties of customs thereon, by certain persons unknown, clandestinely and illegally removed from and out of the said warehouse, where the same had been so deposited and secured as aforesaid, contrary to the form of the statute, &c.; whereby, and by force of the said statute, the said goods and merchandize became forfeited. The second count stated, that the goods and merchandize, so deposited in the King's Warehouse, were, by certain persons unknown, taken and delivered out of such warehouse, where the same had been so deposited and secured, *without having been duly entered, against*

*Eccles. of Pleas,* the statute, it must appear that the place in which the goods were deposited, was "a warehouse or place of security" within the meaning of the latter clause. The place is described in the first count as "a certain warehouse in the United Kingdom, that is to say, in *London*, commonly called the King's Warehouse, at the *Custom House*." The King's Warehouse is not a warehouse within the statute. The merchant has no power of depositing his goods there. In the interpretation clause of the statute 3 & 4 Will. 4, c. 52, s. 119, the distinction between the King's Warehouse and other warehouses appears. It is enacted, that the term "warehouse" shall be taken to mean any place, whether house, shed, yard, timber pond, or other place, in which goods entered to be warehoused upon importation may be lodged, kept, and secured without payment of duty, or although prohibited to be used in the United Kingdom; and it is enacted, that the King's Warehouse "shall be construed to mean any place provided by the Crown for lodging goods therein for security of the customs." Then, is a place provided by the Crown for lodging goods therein, (that is to say, for the Crown, and not the merchant, to lodge them), for security of the customs, a *warehouse* within the meaning of the act? Certainly not. The statute means warehouses, in which the merchant has the power of depositing, and from which he has also the power of removing the goods. There is also another part of the clause which clearly shews that the act was not intended to include the King's warehouse. The words are, "If any goods whatsoever, which shall have been warehoused, or otherwise secured, in the United Kingdom, either for home-consumption or for exportation, shall be clandestinely removed out of any warehouse or

aforesaid shall be forfeited, together with all horses and other animals, and all carriages and

other things made use of in the removal of such goods."

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place of security, &c." The warehouse then, or place of security, from which the clandestine removal takes place, must be such as the goods can be warehoused in for *home consumption* or *exportation*. The object of lodging goods in the King's Warehouse is, according to the interpretation clause above cited, "for security of the customs." They are not lodged there for home consumption or exportation. They are deposited there by the King's officer for customs, and not by the merchant. [Lord Lyndhurst, C. B.—When goods are deposited in the King's Warehouse until they have paid the duties, is it not to be taken that they are deposited there for home consumption? It is contended, that this is the act of the officer of the Crown, and not of the merchant; but, constructively, is it not the act of the latter, when he permits the officer to lodge them in the King's Warehouse, in default of payment of duty? He may obtain possession of them again upon payment, and may then dispose of them for home consumption.] The entry in the King's Warehouse is a proceeding *in invitum*. The first count also is bad, because it does not shew that the goods had been entered in any warehouse, or secured, "either for home consumption or exportation." Upon both grounds therefore—*first*, that the goods were not deposited in such a warehouse as the statute contemplates; and, *secondly*, that they were not deposited for home consumption, or for exportation, but merely for security of customs—the first count is bad. The second count is framed upon the 20th section of the 3 & 4 Will. 4, c. 52 (a), and is bad, for the same reason

(a) "And be it enacted, that no entry nor any warrant for the landing of any goods, or for the taking of any goods out of any warehouse, shall be deemed valid, unless the particulars of the goods and packages in such entry shall correspond with the particulars of

the goods and packages purporting to be the same in the report of the ship, and in the manifest where a manifest is required, and in the certificate or other document where any is required, by which the importation or entry of such goods is authorized; nor un-

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 the term "any warehouse," include the King's Warehouse.  
 They are not taken out of *any warehouse* in which the  
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 merchant could have deposited them; and such a taking  
 VONNICKA.  
 is not prohibited by the statute.

**Lord LYNDHURST, C. B.**—Whether the judgment could be supported upon the first count of the information it is unnecessary to inquire, for we are all clearly of opinion that the second count is good; and the verdict may be entered up for the Crown upon that count. The only doubt which we have entertained upon the validity of the first count is, with regard to the purpose for which the goods must appear to have been deposited.

**PARKE, B.**—The second count is good. The 20th section of the 3 & 4 Will. 4, c. 52, mentions generally, "any warehouse," and whether the goods were lodged in the King's Warehouse or not is immaterial. I have entertained some doubt with regard to the first count; but the words of the 20th section, upon which the second count is framed, do not confine the case to goods deposited for home consumption or for exportation.

**ALDERSHORN, B., and GURNEY, B.**, concurred.

Rule refused.

less the goods shall have been properly described in such entry, by the denominations and with the characters and circumstances according to which such goods are charged with duty, or may be imported, either to be used in the United Kingdom, or to be warehoused for exportation only; and

*any goods taken or delivered out of any ship, or out of any warehouse, or for the delivery of which, or for any order for the delivery of which from any warehouse, demand shall have been made, not having been duly entered, shall be forfeited."*

Brock. of Pleas,  
1834.

### BALL v. HAMLET.

**BOMPAS**, Serjt., moved for a rule to shew cause why the issue in this case, and the notice of trial indorsed thereon, should not be set aside for irregularity. He moved upon two grounds: *first*, that the issue did not state the form of action; and, *secondly*, that it did not set forth the dates required by the forms given in the new rules.

The dates of the pleadings must be inserted in the issue; but not the form of action.

**PARKE, B.**—The manner in which issues are now directed to be framed (*a*) does not require that the form of action should be stated. That, therefore, is not necessary, and, as it is not mentioned in the form, it ought not to be inserted. The dates, however, are required by the form to be set forth, and, upon that point, the rule must be granted; but it will be of little use, as the party will have leave to amend.

**Rule granted on the second ground.**

*Bompas* applied for the rule to be a stay of proceedings; but the Court refused the application.

(*a*) Rule H. T. 4 Will. 4, Form No. 1.

### COPPELO v. BROWN.

**T**HE writ of *capias* in this case was indorsed in the following manner:—“The plaintiff claims 20*l.* for debt, with

An indorsement upon a *capias* that plaintiff claims 20*l.* for debt, “with interest thereon from the 20th day of March,” is sufficiently certain.

Interest thereon from the 20th day of March,” is sufficiently certain.

*Exch. of Pleas,* interest thereon from the 10th day of *March* last, and *3l.* for  
1834. costs," &c.

COPPELLO  
v.  
BROWN.

*Knowles* now moved to set aside the bail-bond, on the ground that the amount of the plaintiff's demand was not specified with sufficient certainty, pursuant to the stat. 2 Will. 4, c. 39. The object of that statute was to enable a defendant to know the precise amount of the plaintiff's claim, in order that he might make a tender; but here the plaintiff claims an uncertain sum by way of interest.

*Per Curiam*.—The indorsement is sufficiently positive.

Rule refused (a).

(a) See *Perry v. Patchett*, ante, 87.



#### LAMBERT v. WRAY.

An affidavit of debt on a covenant to pay money, stating that the defendant is indebted to the plaintiff in the sum, upon a covenant for the payment of it at a day now past, is good.

THE affidavit to hold to bail in this case stated, that *Thomas Wray* (the defendant) was "justly and truly indebted to the deponent (the plaintiff) in the sum of &c., and upwards, upon and by virtue of a certain indenture made between &c., whereby the said *T. W.* did covenant and agree that he, the said *T. W.*, and his wife, his executors, &c., or some or one of them, should and would well and truly pay or cause to be paid to the deponent the said sum of &c., with lawful interest for the same, at the rate of five pounds *per cent. per annum*, at a day now passed.

*Humphrey* now moved to discharge the defendant out of custody, on entering a common appearance, upon the

ground that the affidavit did not shew that the money was not paid on the day, or that it still remained due.

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1834.*

LAMBERT  
v.  
WRAY.

**PARKE, B.**—The affidavit states that the time for payment of the money has elapsed, and that the defendant is indebted to the plaintiff in the sum in question. He could not be so indebted unless the money had not been paid, and unless it still remained due. The affidavit is sufficiently positive.

Rule refused.



### MACHER v. BILLING.

THE declaration in this case was delivered on the 28th of October, indorsed to plead in four days. On the 31st October, the defendant obtained a week's time to plead, and, on the 3rd of November, he procured an order for particulars. On the 7th of November, the plaintiff delivered the particulars, and on the following day the defendant delivered a plea of the Statute of Limitations, not signed by counsel. The plaintiff signed judgment on the 10th of November, on the ground that the plea was a nullity. A rule having been obtained to set aside this judgment for irregularity—

Where an unsigned plea is delivered, the plaintiff is not entitled to sign judgment before the time for pleading has expired.

A plea of the Statute of Limitations requires counsel's hand.

*Chilton* now shewed cause.—It has been expressly decided that a plea of the Statute of Limitations requires counsel's hand (*a*), and the new rule (*b*) makes no difference. The defendant, then, having delivered an informal plea, the plaintiff was entitled to sign judgment.

The Court said that the plea certainly required to be signed by counsel.

(*a*) Tidd's Pr. 672, 9th ed.

(*b*) R. H. 4 W. 4, 107.

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*Baxett*, in support of the rule, then insisted that judgment had been signed too soon. In *Pepperell v. Burrell*(a), where an order for time to plead was obtained, and before the expiration of that time pleas were delivered, but irregular in several respects, and before the expiration of the time for pleading the plaintiff signed judgment as for want of a plea, the Court set aside the judgment for irregularity, as having been signed too early.

The Court took time to consider, and on the last day of Term—

PARKE, B., said—There was a case of *Macher v. Billing*, with regard to the signing judgment immediately upon the delivery of an unsigned plea; and the Court took time to consider the point, as there were some old cases in the *King's Bench*, in which it had been held, that, on the filing of such a plea, judgment might be signed immediately, on the ground of its being a nullity. But, according to the case in this Court, cited in the argument, to which the practice of all the Courts may be considered as conforming, though the plea may be a nullity, the plaintiff cannot sign judgment till the time for pleading has expired.

Rule absolute.

(a) 1 C. M. & R. 372.

#### LESLIE v. DISNEY.

*Somerset* herald having been arrested on meane process, the Court refused to discharge him on motion, but left him to sue out his writ of privilege.

*KELLY* had obtained a rule to shew cause why the defendant in this case should not be discharged out of custody, on the ground of privilege, as one of the king's servants. It appeared from the affidavits that the defendant held the office of *Somerset* herald by letters patent; that

he had a fixed salary and a livery from the King, and was liable at any time to be called upon to attend his Majesty. He swore that he considered himself to be one of the King's servants in ordinary. The privilege of the heralds from arrest had been allowed by the House of Lords (*a*).

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v.  
DISNEY.

*Richards* now shewed cause.—The application is too late. The arrest was on the 8th, and the rule was not moved for until the 20th. Nor will the Court interfere in this summary manner where the officer is not one in actual attendance upon the King, and where the application is not made under the sanction of the Crown, but merely at the instance of the officer himself. *Fisher v. Begrez* (*b*).

**PARKE, B.**—It is not necessary for the Court to decide whether *Somerset* herald is or is not entitled by reason of his privilege to be discharged from arrest; that question will be properly decided when he sues out his writ of privilege, which we think he ought to be put to, as was done in the case of *Luntley v. Battine* (*c*), where the Court of *King's Bench* compelled a gentleman of the King's privy chamber to resort to that mode of applying for relief.

**ALDERSON, B.**—This case very nearly resembles that of the gentleman of the privy chamber. The ground of decision in *Luntley v. Battine* was, that the officer in question was rarely called upon to attend his Majesty, and that no inconvenience would ensue from his being left to sue out his writ of privilege. The heralds, likewise, only attend on occasions of state and ceremony, and there is no ground for claiming the summary interposition of the Court.

Rule discharged.

(*a*) In 1693, *Lords' Journ.*, Vol. 15, p. 303.      (*b*) 2 Crom. & M. 240.      (*c*) 2 B. & A. 234.

*Exch. of Pleas,  
1834.*

REYNOLDS v. WELSH.

The plaintiff declared in the commencement of his declaration as assignee of the sheriff, and then set forth a bond to himself:—*Hold no ground of demurrer.*

THE declaration commenced as follows:—"S. R., assignee of S. W., Esq., and J. H., Esq., sheriff of the county of *Middlesex*, &c., complains of the defendant, who has been summoned to answer the said S. R., assignee, &c., as aforesaid," &c., and it then proceeded to set forth a bond made to the plaintiff himself. Demurrer, assigning for cause that the plaintiff had declared as assignee of the sheriff, upon a bond afterwards alleged to be executed to himself, without shewing any assignment by the sheriff. Joinder in demurrer.

*Channell*, in support of the demurrer.—The description of the party cannot be treated as surplusage, for here the plaintiff could only sue in his representative capacity.

*Parke*, B.—It was not necessary to insert the recital of the writ in the declaration, and the statement may be rejected as surplusage.

*Barstow* appeared to support the declaration.

Judgment for the plaintiff (a).

(a) On the same day the same point was decided upon a declaration where the plaintiffs commenced by intitling themselves "executors," and then set forth a cause of action accruing to themselves. *Hargraves v. Holden.*

Exch. of Pleas,  
1834.

The KING *v.* The Sheriff of SURREY, in a cause of  
WESTON *v.* Woods.

**C. JONES** had obtained a rule on behalf of the sheriff of *Surrey*, for setting aside an attachment against him for not bringing in the body. The conclusion of the affidavit upon which he moved was in the following terms:—"This deponent says, that he is not in collusion with the said *W. W.*, but that the said special bail was put in, and the said *W. W.* surrendered at the instance of such defendant, for the sole protection of the said sheriff of *Surrey*, whom this deponent still seeks to protect by this application."

An affidavit, in support of an application by a sheriff to set aside a regular attachment against him for not bringing in the body, must state that the application is made on his behalf, and at his expense.

**Greaves** now shewed cause, and objected to the omission in the affidavit of the usual allegation that the application was made on the *behalf of the sheriff* and *at his own expense*. Such an averment was made necessary in the *King's Bench* by rule 59 *Geo. 3 (a)*, and the same appears to be the form usually adopted in this Court (*b*).

**C. Jones** contended, that though the affidavit did not adopt the very words, yet, in substance, it stated that the sheriff was the party on whose behalf the application was made.

Lord LYNDHURST, C. B., after stating that it was better to adhere to the form, said—The affidavit does not say "*at his own expense*," nor can that be inferred from it; but the rule may be enlarged to give the party an opportunity of producing a better affidavit.

Rule enlarged accordingly.

(*a*) 2 B. & A. 240.

(*b*) Price, Exch. Pr. Appx. 157.

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1834.

DAVIES v. JONES.

Where the writ of summons was to answer in trespass on the case, and had no indorsement of the sum demanded; and the particulars of demand, which had been delivered with the notice of declaration, shewed a claim for wages—the Court refused to set aside the writ for irregularity, the plaintiff not having declared.

**C**HILTON moved to set aside the writ of summons and the proceedings thereon for irregularity. The irregularity was, that the summons was to answer the plaintiff in an action of trespass on the case, and that there was no indorsement upon the writ of the sum demanded. The particulars of the plaintiff's demand were for the sum of 7*l.*, due to the plaintiff for wages as clerk to the defendant. The particulars had been delivered, together with the notice of declaration, but no declaration had as yet been filed.

**L**ord LYNDHURST, C. B.—There is as yet no irregularity. The declaration may shew an irregularity, but there is none at present.

**P**ARKE, B., concurred.

**A**LDERSON, B.—The defendant must wait until the plaintiff has declared. Were we to grant this application we should be setting aside the writ before we know the nature of the demand.

**G**URNEY, B., was of the same opinion.

*Chilton* then contended that the notice of declaration was irregular, and the Court granted him a rule to set it aside.

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1834.

WILLIAMS v. EDWARDS.

THIS was a country cause, in which issue had been joined in *Easter Vacation* last; no notice of trial had been given. In the course of this term, *Rawlinson* obtained a rule *nisi* for judgment as in case of a nonsuit.

*Knowles* shewed cause, and contended that the application was too early; that such a motion could not be made until the third term inclusive after issue joined, unless notice of trial has been given. Here issue was joined in *Easter Vacation*, which does not now relate back to *Easter Term*.

In a country cause, where issue is joined in *Easter Vacation*, the defendant may move in *Michaelmas Term* for judgment as in case of a nonsuit.

*Rawlinson*, in support of the rule, denied that there was any such rule with respect to country causes; but, even if there were, he contended that the motion here must be considered as having been made in the third term, issue having been joined in *Easter Vacation*. It was true, that, by the new rules, the proceedings were to bear date on the actual day on which they took place; but it was not the intention of the framers of the rules to make the proceedings more dilatory; and, to prevent any doubt on the subject, it was provided by rule 2, *Hil. T.*, 4 *W. 4*, "that such regulations shall not alter or affect any existing rules of practice as to the time of proceeding in the cause." It was true that the issue had not been entered, but that was not now necessary. *Hil. Term*, 2 *W. 4*, rule 70.

**PARKE, B.**—There was no occasion to enter the issue, and our present impression is, that the plaintiff ought to have proceeded, and that the application is not too early; but we will consider the point.

Upon a subsequent day, **PARKE, B.**, said—This was a country cause, and issue was joined in the vacation before

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1834.

WILLIAMS  
*v.*  
EDWARDS.

last *Trinity* Term, and, as no further time was intended by the new rules to be given in this respect, we think that *Michaelmas* Term must be considered as the time in which the defendant is entitled to move for judgment as in case of a nonsuit, and therefore, unless a peremptory undertaking is given, the rule must be made absolute.

**ALDERSON, B.**—This was a country cause, and issue was joined in the vacation before an issuable term. By the now course of the Court, the plaintiff ought to have taken down the record for trial at the assizes. The usual course of the Court is so now, and accordingly there has been a default, and the motion is regular.

#### FENNELL *v.* TAIT.

A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up.

**MANNING** applied for a writ of *habeas corpus ad testificandum* to bring up the body of a person who was confined as a lunatic, for the purpose of giving evidence in this cause.

**PARKE, B.**—If you make an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up, a *habeas corpus* should be granted. You can apply to a Judge at chambers.

#### PACKHAM *v.* NEWMAN.

*Sembie*, that the sheriff, on a writ of trial, cannot put off the trial, but that the application must be made to a Judge.

**AT** the trial of this case before the sheriff of *Sussex*, upon a writ of trial, the jury having been sworn, the plaintiff's attorney applied to have the trial postponed on account of the absence of a material witness. The sheriff refused, thinking that he had no power, and the plaintiff had a verdict.

*Clarkson*, on an affidavit of these facts and of merits, had obtained a rule to set aside the verdict and for a new trial.

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1834.

PACKHAM  
v.  
NEWMAN.

*Humfrey* shewed cause, and contended that the application to the sheriff should have been made before the jury were sworn; and he submitted that the Court had no power to interfere, as there was no certificate under the hand of the sheriff, according to the 18th section of the act 3 & 4 Will. 4, c. 42. [Parke, B.—That provision is for the purpose of staying the judgment and execution, if the sheriff chooses to certify; but surely the Court have the power to set aside the verdict.] At all events, the application was too late when the jury had been sworn.

*Clarkson, contra*.—There would have been no advantage by applying to the sheriff at an earlier period, as it seems from the act that he must obey the writ and try the cause; his power to put it off is at most doubtful.

**ALDERSON, B.**.—The proper course is to apply to a Judge to put off the trial.

**PARKE, B.**.—As there is an affidavit of merits the rule must be absolute for a new trial on payment of costs.

Rule accordingly.

WHEN the rule *nisi* was moved for, the Court inquired whether it was moved as against evidence; and, if so, whether the verdict was under 5*l.*; and they intimated, that, with the concurrence of the Judges of the other Courts, the rule would be, that, in the case of a writ of trial, no new trial as against evidence would be granted when the verdict was under 5*l.*

In the case of a writ of trial, no new trial will be granted on the ground of the verdict being against evidence, when the verdict is for less than 5*l.*

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1834.

BARRETT *v.* WILSON.

The Court will not set aside an award on the ground that the arbitrator has come to a wrong conclusion on the facts, if there be any evidence to support his finding, though they may not think the arbitrator right in his conclusion from such evidence.

**ALEXANDER** had obtained a rule *nisi* to set aside an award made in this case, which was an action to determine rights to water. The arbitrator, in his award, described the premises, and directed a verdict to be entered for the plaintiff, with 1*s.* damages. He then stated upon his award, that, in order that the parties might not be precluded from taking the opinion of the Court, whether in point of law he had come to a right decision, he found certain facts for the opinion of the Court, and directed that in the event of the Court being against him in opinion, a nonsuit should be entered.

**Wortley** was to have shewn cause, but *Alexander* was called upon in support of the rule.

**Lord LYNDHURST, C. B.**—The question is, whether there was any evidence to support the finding of the arbitrator. If there were, and he has drawn his conclusion, we cannot interfere, even if he has in our opinion drawn a wrong conclusion from the evidence.

**PARKE, B.**—The parties have agreed to be bound by the arbitrator's opinion of the facts, not by ours. The Court have a control over juries as to matter of fact, which they exercise where the conclusion is manifestly wrong. They have no such control over an arbitrator as to matter of fact. Whether I should have come to the same conclusion as the arbitrator has done, is a different question; but, the parties being bound to abide by his decision of the facts, we cannot interfere if there were any evidence to support his conclusion.

**ALDERSON, B.**—The only question is, whether there was any evidence which a Judge would have been justi-

fied in leaving to a jury. If there were, we cannot interfere with the conclusion which the arbitrator has drawn.

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GURNEY, B., concurred.

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v.  
WILSON.

Rule discharged.

### GURNEY v. HOPKINSON.

**HOGGINS** had obtained a rule on behalf of the defendant's bail to set aside the writ of *capias* for irregularity, in stating the cause of action to be trespass on the case upon promises. On cause being shewn, it appeared that an application had been made, in the beginning of the long vacation, to a Baron to discharge the defendant out of custody, on the same objection; but the learned Baron refused to interfere. The defendant then gave bail to the sheriff, and bail to the action not being perfected in time, the plaintiff took an assignment of the bail-bond, and proceeded thereon. The bail pleaded in the action, that no writ on which the defendant in the original action could or ought to be arrested was ever issued. A summons before a Baron was taken out in the action against the bail, for the plaintiff to be at liberty to treat the plea as a nullity, and to sign judgment, which was dismissed.

Bail cannot apply to set aside the *capias* against their principal, on the ground of the action being described therein as an action of trespass on the case upon promises.

Such a *capias* is irregular only, and not void.

The mistake must be taken advantage of by an application to set aside the writ for irregularity.

**Busby** shewed cause against the rule.—Taking out the summons for the same objection has precluded the parties from applying to the Court. They have chosen to go before the learned Baron, who dismissed the summons, and thereby decided the point against them. Besides, there is nothing in the objection; the Uniformity of Process Act has not done away with the action of trespass on the case upon promises. [Parke, B.—It is too late now to question whether this is an irregularity. It has been

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decided to be so in many cases; we need not now inquire, whether, in the first instance, the point was rightly or wrongly determined.] At all events, this is not an objection which the bail can make.

*Hoggins*, in support of the rule.—The writ is void. But even if it be only irregular, the bail ought to be allowed to take any objection which their principal could take. If the principal be entitled to relief, surely it cannot be refused to the bail.

*PARKE, B.*—The proceeding against the principal is *in invitum*. The bail are volunteers. They come in voluntarily, and undertake that the defendant shall appear to the writ. They cannot be allowed to say that the writ is irregular. If it be altogether void, as suggested, they are not without remedy; but they cannot be permitted to set it aside as irregular, on an application of this nature.

The rest of the Court concurred, and the rule was

Discharged with costs.

In the course of this term the action on the bail-bond was tried before *Bolland, B.*, when, by the direction of the learned Baron, a verdict was taken for the plaintiff, with leave to the defendant to move to enter a verdict for him.

*Thesiger* now moved accordingly.—The defendant could not properly have been arrested by virtue of the writ of *capias* which was given in evidence in this cause. There is, since the Uniformity of Process Act, no writ in an action of trespass on the case upon promises. It has been decided that the form given in the writ must be strictly adhered to. That was held as to this very objec-

tion in *King v. Skeffington* (a). [Alderson, B.—There is *Each. of Pleas,*  
no doubt it is irregular. The question is, whether it is void.  
Have you looked at the rule of Court on the subject? (b)  
Parke, B.—By the Uniformity of Process Act (c) power  
is given to the Judges to make rules for the effectual ex-  
ecution of the act, and of the intention and object thereof;  
and in pursuance of that power, the rule alluded to by  
my brother Alderson was made; by which it is ordered,  
“that, if the plaintiff or his attorney shall omit to insert  
in or indorse on any writ or copy thereof, any of the mat-  
ters required by the said act to be by him inserted therein  
or indorsed thereon, such writ, or copy thereof, shall not,  
on that account, be held void, but it may be set aside as  
irregular, upon application to be made to the Court out  
of which the same shall issue, or to any Judge.” Here the  
party omits to insert in the writ the true nature of the action.]  
It is submitted, that the 10th rule of *Michaelmas Term*, 3  
*Will. 4*, refers to the 12th section of the Uniformity of  
Process Act, which directs certain matters to be inserted  
in and indorsed upon the writ. The rule in question was  
framed with reference to the matters required by the 12th  
section, and not to the nature of the action, which is re-  
quired by the statute to be stated in the writ, in the exact  
form prescribed in the schedule to the act. If it were  
otherwise, a person would be held to bail on a writ, not  
being the process which the 4th section enacts shall be  
the only process on which persons shall be held to bail.  
The effect of the Uniformity of Process Act is to make  
any process which is not in the form given in the schedule  
void; and if so, the defendant was entitled to succeed on  
the plea in the present case.

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PARKE, B.—I am glad that the rule will have the effect

(a) 1 C. & M. 363.

3 Will. 4.

(b) Rule 10, Michaelmas Term,

(c) 2 Will. 4, c. 39, s. 14.

*Exch. of Pleas,* of defeating such an objection. Taking into consideration  
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 the provisions of the act for uniformity of process, and the  
 rule arising out of and made in pursuance of that statute,  
 it is clear that this is an irregularity, and that the writ  
 is only informal, and not void.

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**ALDERSON, B.**—One of the things required to be inserted is the cause of action. The Courts have held, that it is necessary to adhere strictly to the language of the act of Parliament. The mode of taking advantage of the error is pointed out by the 10th rule of *Michaelmas Term*, 3 *Will. 4*, which prevents the writ from being void; and the rule was framed by the Judges to prevent this very inconvenience from arising.

The rest of the Court concurred.

Rule refused.



#### TOWNSEND v. GURNEY.

**KNOWLES** moved to set aside a declaration for irregularity, on the ground of venue being improperly inserted, contrary to the provisions of the new rules.

The improper insertion of venue in a declaration, contrary to the new rules, is not an irregularity for which the declaration can be set aside; the course is to apply to a Judge at chambers to strike it out.

**GURNEY, B.**—It is not an irregularity for which the declaration can be set aside; the course is to apply to a Judge at chambers to strike it out.

Rule refused.

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### Earl of LONSDALE v. WHINNAY.

**O**N the defendant's leaving certain premises, of which he had been tenant to the plaintiff, disputes arose as to the rent due and the state of repair, which were afterwards referred to arbitration. An award was made in the plaintiff's favour for 348*l.*, and the submission having been made a rule of Court, an attachment was obtained, under which defendant was committed to prison. Subsequently the plaintiff commenced an action on the award. Under these circumstances, *Dundas* obtained a rule calling on the plaintiff to shew cause why the action should not be discontinued or stayed, on payment of costs by the plaintiff to the defendant, or why the defendant should not be discharged out of custody.

*Cowling* now shewed cause on affidavits, which stated, that, after the award, applications had been made in a friendly manner from time to time to the defendant to pay the money, that the defendant was fully competent to do so, but that he had declared he would rather go to gaol than pay it. He contended that the plaintiff had acted correctly; the action had been rendered necessary by the defendant's obstinacy in lying in gaol instead of paying the money; the award was likely, therefore, to prove fruitless, and the plaintiff had a right to commence an action in order to take out execution against the defendant's property. [*Parke*, B.—The plaintiff must make his election between the action and the attachment.] There is no inconsistency in proceeding both ways. The Court ought not to interfere unless the plaintiff has acted without reason and there is a hardship on the defendant. [*Parke*, B.—What case lays down the rule that the plaintiff will be put to his election only when he has acted without reason in bringing the action after the attachment? Suppose the action had been commenced first, could an attach-

The defendant, being taken under an attachment for non-performance of an award, went to prison, and, though he was able to pay, he refused so to do, perversely declaring that he would rather go to gaol than pay. The plaintiff then commenced an action upon the award; and on motion that the plaintiff might be compelled to discontinue, or the defendant might be discharged out of custody, the Court ordered him to be discharged, on giving a bond to the plaintiff, with sureties to the Master's satisfaction, conditioned to the same effect as in the case of a recognizance of bail.

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1834.

Earl of  
LONSDALE  
v.  
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ment have been obtained afterwards?] The rule is nowhere so expressly laid down, but is implied in all the cases, because no case says, that, under every circumstance, the plaintiff shall be put to his election. Now here the plaintiff had good ground for proceeding against the defendant's goods after his perverse conduct; and there is no hardship on the defendant, for he is in precisely the same situation as if the plaintiff had not attached him, but proceeded by way of action with bailable process, and the defendant had refused either to put in bail or pay money into Court, and had chosen to lie in gaol. In fact, the hardship is the other way; for, if the defendant be discharged absolutely, the plaintiff will have lost the opportunity of arresting him, which he probably would otherwise have done, and, therefore, the defendant ought only to be discharged on the terms of putting in bail or paying the money awarded into Court. If the plaintiff had arrested the defendant in the action, or if, after having obtained judgment, he had taken him in execution, the defendant might have had a right to be discharged unconditionally, because, in such case, there would have been a hardship, and also an inconsistency, since the plaintiff would have been proceeding both ways against the defendant personally. But, proceeding by attachment against the defendant personally, and by action against his property, is not inconsistent. The older authorities seem to confirm this distinction. *Anon.* (a), and *Webster v. Bishop* (b). In *Richards v. Clancey* (c) the defendant had been taken in execution. In the leading case of *Stock v. De Smith* (d), Lord Hardwicke says:—"So, in the case in 1 Salk. 73, no action was depending when the attachment was granted; though, in that case, I should have thought it considerable whether, when he had got bail to his action, the Court should not have

(a) 1 Salk. 73.

(b) 2 Vern. 44.

(c) 1 Barnard. 386.

(d) Cas. temp. Hardw. 106.

stopped the attachment; but, however, the attachment there was granted before any action was brought." This seems to shew that an unconditional election will only be insisted on where the plaintiff in the action is proceeding against the person of the defendant.

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**Dundas**, in support of the rule.—The old rule was as stated on the other side, but that has been long overruled. The correct rule is laid down, as deduced from the authorities, in 2nd *Tidd's Pract.* (a). It is there said:—"Upon a submission being made a rule of Court, it was formerly holden that the party might proceed both by action and attachment at the same time; but a different doctrine has been since laid down, and accordingly, in a late case (b), the Court of *Common Pleas* would not grant an attachment for non-performance of an award pending an action brought upon it; nor would they allow the plaintiff to waive the action in order to apply for an attachment." The modern rule, therefore, is, that a defendant in such a case is entitled to be discharged unconditionally, the plaintiff being held to have made his election.

**PARKE, B.**—The action may proceed, and the defendant may be discharged on giving a bond to the plaintiff, with sureties to the satisfaction of the Master; the same obligations to be entered into that are taken upon themselves by bail. There might be a difficulty in entering into a recognizance of bail.

The rest of the Court concurred.

Rule accordingly.

(a) *Page* 887, 8th ed.

(b) *Badley v. Loveday*, 1 Bos. & Pull. 81.

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POPJOY'S Bail *at. S. SAUNDERS.*

The original affidavit of justification of bail filed at chambers was incorrect, and the plaintiff opposed their justification on that ground. The bail justified on a fresh affidavit, which was correct:—*Held*, that the defendant was neither to pay nor receive costs.

**C. JONES** opposed the justification of the bail on the ground that the word “possessed” was used instead of the word “worth.”

**R. V. Richards**, in support of the bail, stated that the original affidavit filed at chambers was incorrect; but that he was now moving to justify on a correct affidavit. The only question was, whether he was entitled to the costs.

**PARKE, B.**—The effect is, that you will have no costs, but you will not have to pay any.

The bail justified accordingly.

—♦—  
**DAWSON v. BOWMAN.**

An application to change the venue on special grounds must be made the subject of a distinct motion; and where the venue has been improperly changed on the common affidavit, in a case where part of the demand was on a bill of exchange, such special circumstances furnish no answer to an application to discharge the rule for changing the venue.

**CHILTON** had obtained a rule to change the venue on the usual affidavit. A rule to discharge that rule was obtained, on the ground that part of the demand arose on a bill of exchange.

*Chilton* shewed cause on an affidavit stating special grounds for changing the venue. He admitted that the recent decision of *Walthew v. Syers* (*a*) had overruled *Greenway v. Carrington* (*b*); but he relied on the special grounds stated in his affidavit.

**Per Curiam.**—The special circumstances make no dif-

(*a*) *Post*, p. 596.

(*b*) 7 *Price*, 564.

ference. If there is ground on special circumstances to change the venue, a distinct motion must be made for that purpose on affidavit of the facts, which the other party will then have an opportunity of answering; but they furnish no answer to the present application for discharging the common rule to change the venue. As to the other point, we held very recently, in *Walthew v. Syers*, that the venue could not be changed on the usual affidavit where part of the demand arises on a bill of exchange. The practice of the Court of *King's Bench* is the same in this respect. As our decision was so recent, and there may have been a doubt about the practice, the rule may be made absolute without costs.

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Rule accordingly.



#### BROWN *v.* GERARD.

THIS was an action which had been brought against the sheriff of *Lancashire* for the illegal conduct of one of his officers, of the name of *Oglethorpe*, in unlawfully taking greater fees and recompence than proper on an execution against the plaintiff. The defence was conducted by *Oglethorpe*; and on the commission day of the assizes, when the cause stood for trial, *Oglethorpe* signed the following memorandum:—"In consideration of the plaintiff agreeing to accept of 12*l.* for the debt in this cause, and of his staying the proceedings therein, I do hereby undertake to pay him the said sum of 12*l.*, together with the costs of the said action, in seven days from this date; and, if default is made therein, I undertake that the plea pleaded in this action shall be withdrawn, and the plaintiff shall have

In an action against the plaintiff for the extortion of his officer, the officer undertook, by a written memorandum, in consideration of a sum of money being accepted and proceedings stayed, to pay the sum of money, with costs, in seven days, and, on default thereof, that the plea should be withdrawn, and that the plaintiff should have judgment. The undertaking

not being complied with, the Court refused a rule *nisi* to compel the officer to perform his undertaking, he not being an officer of the Court.

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judgment." On the faith of this memorandum, the plaintiff's attorney did not enter the cause, and the proceedings were stayed. The money not being paid, and the plea not being withdrawn—

*Wightman* now moved for a rule *nisi* to compel *Oglethorpe* to perform his undertaking. He urged that the Courts frequently compel attorneys to perform undertakings of this sort; and contended that the Court might exercise such a power in the case of the real defendant being the bailiff of the sheriff, who is the officer of the Court.

*Sed per GURNEY, B. (a).*—The Court will compel an attorney to perform such an undertaking, because he is the officer of the Court. The person against whom the present application is made is not an officer of the Court, and, not being a party in the cause, the Court cannot compel him in this summary way to perform his undertaking.

Rule refused.

(a) Sitting as single Judge.



#### WALTHEW *v.* SYERS.

The venue cannot be changed on the usual affidavit, where part of the demand arises on a bill of exchange.

*ARCHBOLD* moved on the usual affidavit to change the venue. Part of the demand in the declaration, to the amount of 100*l.*, was on a bill of exchange; but the remainder, to the amount of 80*l.*, was for goods sold. He cited *Greenway v. Carrington (a)*.

*GURNEY, B.*, said that he would consult the rest of the Court; and afterwards stated, that the other learned Barons

(a) 7 Price, 564.

concurred with him in thinking that the venue can only be changed upon special grounds where part of the demand arises on a bill of exchange.

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SYERS.

Rule refused.



### PHILLIPS *v.* TURNER.

**MILLER** moved to discharge the defendant out of custody for a defect in the affidavit to hold to bail, which stated that the defendant was indebted to the plaintiff in &c., on a bill drawn by *A. B.* upon and accepted by the defendant, payable to the said *A. B.* at a day now past, and by the said *A. B.* indorsed to *E. F.*, and by *E. F.* indorsed to the plaintiff. The objection was, that it was not expressly alleged that the bill was unpaid or dishonoured.

An affidavit to hold to bail stated that the defendant was indebted, &c., on a bill drawn and accepted by the defendant, &c., payable at a day now past, &c., without expressly stating that the bill was unpaid or dishonoured:—  
*Held sufficient.*

*Per GURNEY, B.*, after consulting with the other Judges.—The rest of the Court agree with me that the affidavit is sufficient.

Rule refused.



### BYRNE *v.* FITZHUGH and Another.

**KELLY** moved to set aside an award made in a cause in the *Common Pleas* at *Lancaster*. A verdict had been taken at the *Lancaster Assizes* for the plaintiff, subject to the award of an arbitrator, who reduced the damages, and ordered the verdict to stand for such reduced sum; and stated facts specially to enable the defendant to take the opinion of the Court on a point of law; and he stated, that, if the point of law was decided in the defendant's favour, a nonsuit ought to be entered (*a*). *Kelly* referred to the

The 28th section of the 4 & 5 Will. 4, c. 62, does not authorize this Court to entertain a motion, in a cause in the *Common Pleas* at *Lancaster*, to set aside an award made under an order of *Nisi Prius*, though a verdict was taken subject to the award.

(*a*) See post, p. 613, n. (*a*).

*Exch. of Pleas, 4 & 5 Will. 4, c. 62, s. 26;* by which it is enacted, “that it shall be lawful for any party, in any action now depending or hereafter to be depending in the said court of *Common Pleas* at *Lancaster*, to apply by motion to any one of the superior Courts at *Westminster*, sitting *in banco*, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in the said superior Court, for a rule to shew cause why a new trial should not be granted, or nonsuit set aside and a new trial had, or a verdict entered for the plaintiff or defendant, or a nonsuit entered, as the case may be, in such action; which Court is hereby authorized and empowered to grant or refuse such rule;” and he contend-ed that this being in effect an application to set aside a verdict and enter a nonsuit, this Court had authority to deal with the case under the above provision.

*Sed per Curiam.*—This is not an application within the meaning of the act of Parliament. You may apply to any of the Judges. It should be known, that, in pursuance of the 24th section of the statute, all the fifteen Judges have been nominated and appointed Judges of the *Common Pleas* at *Lancaster*.

Rule refused.



#### GRANT's Bail.

#### COUNTRY bail by affidavit.

Rule 3 of *Trin. Term, 1 Will. 4*, applies to country as well as town bail.

*Busby* had opposed them on a former occasion, and they had time to explain a charge which was stated to have existed on the property specified in the affidavit which had accompanied the notice of bail, according to the 3rd rule of *Trinity Term, 1 Will. 4*.

*Humfrey* now produced a satisfactory affidavit as to the supposed charge ; and, on the bail being allowed, he applied for the costs.

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*Busby* suggested that the above rule did not apply to the case of country bail.

*Sed per GURNEY*, B., after referring to the Master.—The defendant is entitled to the costs. The rule applies to country as well as to town bail.

Bail justified, and costs allowed.



#### THOMAS LANE v. THOMAS DRINKWATER.

**DEBT.**—The first count of the declaration stated, that, on the 30th October, 1828, at &c., by a certain indenture then and there made between the said defendant and one *Robert Drinkwater* of the one part, and the said plaintiff and one *Allen Billing* of the other part, he the said defendant and the said *Robert Drinkwater*, for the consideration therein mentioned, did for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, grant, covenant, and agree, *to and with the said plaintiff and the said Allen Billing*,

In consideration of the sum of 300*l.* *T. D.* and *R. D.* by deed, severally and respectively, and for their several and respective heirs, executors, and administrators, granted, covenanted, and agreed, to and with *L.* and *B.*, their heirs, executors, administrators, and assigns, to pay to *L.* and *B.*,

their executors, &c., one annuity, or clear yearly sum of 30*l.*, in the shares and proportions following, viz. the sum of 15*l.*, being one moiety of the annuity, unto *L.*, his executors, &c., and the sum of 15*l.*, the remaining moiety, unto *B.*, his executors, &c., to be respectively paid quarterly. The powers for better securing the payment of the annuity contained in the deed were all given to *L.* and *B.* jointly, and the deed also contained a joint power of attorney to them to enter up a joint judgment; and a joint power was granted to them to dispose of the reversion of a close of land, with a joint power of attorney to sell certain stock; and the annuity was redeemable, on seven days' notice in writing being given, by the payment to *L.* and *B.* of the sum of 307*l.* 10*s.* and all arrears of the annuity. In an action brought by *L.* against *T. D.* to recover arrears of the annuity:—*Held*, that the covenant was a joint covenant, and that the interest in the annuity was joint, and that *L.* could not sue alone.

*Exch. of Pleas,* their executors, administrators, and assigns, that the said defendant and the said *Robert Drinkwater*, their heirs, executors, administrators, and assigns, or some or one of them, should and would, from time to time, and at all times during the term of ninety-nine years thenceforth next ensuing, if the said plaintiff, and *Edward Lane* his son, and the said *Allen Billing*, and *James Edward Billing* his nephew, or the survivors or longest liver of them, should so long live, at or in the *Guildhall* of the city of *London* well and truly pay unto the said *Thomas Lane* and the said *Allen Billing*, and their executors, administrators, and assigns, *one annuity* or clear yearly sum of *30l.* of lawful money, current in *Great Britain*, in the *shares and proportions* following; that is to say, the sum of *15l.* being one moiety of the said annuity or yearly sum, unto the said plaintiff, his executors, administrators, or assigns, and the sum of *15l.* the remaining moiety thereof, unto the said *Allen Billing*, his executors, administrators, or assigns, and the said moieties to be respectively paid by equal quarterly payments, on the 30th *January*, the 30th *April*, the 30th *July*, and the 30th *October*, in every year, clear of any deductions for taxes, rates, assessments, or any other matter whatsoever, the first payment of the said annuity or yearly sum to become due and be made on the 30th day of *January* then next ensuing, provided the said term should be then continuing; and in case the said term should determine by the death of the said plaintiff, and *Edward Lane*, *Allen Billing*, and *James Edward Billing*, or the survivors or longest liver of them, between or in the interval of any two of the said quarterly days of payment, or before the said 30th day of *January* then next, then that, in either of such cases happening, the said defendant and the said *Robert Drinkwater*, their heirs, executors, and assigns, should and would, in like manner, in the moieties aforesaid, on demand thereof, well and truly pay or cause to be paid unto the said plaintiff,

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and the said *Allen Billing*, their executors, administrators, and assigns, such part of the said annuity or yearly sum of 30*l.*, as should be in proportion to the number of days which should have elapsed prior to the day of the decease of the survivors or longest liver of them, the said plaintiff, and the said *Edward Lane, Allen Billing, and James Edward Billing*, and after the day of payment next or immediately preceding that event, if such event should happen after the said 30th day of *January* then next ensuing. Breach, in non-payment of 50*l.* for the plaintiff's share for four years and two quarters of the annuity.

The second count was upon another indenture dated 30th *July, 1830*, granting an additional annuity of 10*l.*, in moieties of 5*l.* each, in like manner as in the first indenture.

The defendant pleaded to the first count, after craving oyer of the indenture, *first*, that the defendant and *Drinkwater* had well and truly paid to the said plaintiff the sum of 15*l.*, being one moiety of the said annuity, by equal quarterly payments, according to the indenture.

*Secondly*, that theretofore, and after the making of the indenture in the first count mentioned, to wit, on &c., to wit, in the county aforesaid, the defendant and the said *Robert Drinkwater* became and were desirous of redeeming and repurchasing the said annuity or yearly sum in the said first count mentioned, and did for that purpose, by and with the consent of the said plaintiff and the said *Allen Billing*, who then and there dispensed with the seven days' notice in writing for that purpose required by and specified in the said indenture in the said first count mentioned, pay to the said plaintiff and the said *Allen Billing*, for the repurchase and redemption of the said annuity, the said sum of 30*7l. 10s.* in the said indenture mentioned, as and in full for the repurchase and redemption of the said annuity in the said first count mentioned; and the said plaintiff and the said *Allen Billing* did then and there accept, receive, and take the said sum of 30*7l.*

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*Each. of Pleas, 10s. as and in full for the repurchase and redemption of  
the same; and the said defendant and the said Robert  
Drinkwater did then and there pay to the said plaintiff  
and the said Allen Billing all arrears of the said annuity  
then due and payable, and all costs and charges thereto-  
fore paid and incurred by the said plaintiff and the said  
Allen Billing in respect of the said annuity, and then  
and there repurchased and redeemed the same annuity  
according to the proviso in that behalf contained in the  
said last-mentioned indenture.*

To the second plea the plaintiff, after protesting that the said seven days' notice in writing was not dispensed with as in the said last-mentioned plea alleged, replied that the said plaintiff and the said *Allen Billing* did not accept, receive, or take the said sum of 30*l.* 10*s.*, in the second plea mentioned, as and in full for the repurchase and redemption of the said annuity in the said first count mentioned; nor did the said defendant and the said *Robert Drinkwater*, or either of them, pay to the said plaintiff and the said *Allen Billing*, or either of them, the arrears of the last-mentioned annuity; nor did the said defendant, nor the said *Robert Drinkwater*, repurchase or redeem the same annuity, according to the indenture in the first count mentioned, in manner and form as the said defendant hath above in his said second plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c. There were the same pleadings also to the second count.

The first indenture, as set out on oyer, was made between *Thomas Drinkwater* (the defendant) and *Robert Drinkwater* of the one part, and *Thomas Lane* (the plaintiff) and *Allen Billing* of the other part; by which, after reciting amongst other things that the said *Thomas Drinkwater* and *R. Drinkwater* had contracted and agreed with the said *Thomas Lane* and *Allen Billing* for the sale to them of an annuity or yearly sum of 30*l.*, to be secured

and payable to them for the term of ninety-nine years, determinable as thereafter mentioned, but to be repurchasable under the proviso thereafter contained for that purpose, and that the true consideration to be paid for the purchase of the annuity was the sum of 300*l.*, and that in pursuance and part performance of the agreement the said *T. Drinkwater* had that day executed a warrant of attorney authorizing certain attorneys to confess a judgment against them in an action of debt, at the suit of the said *Thomas Lane* and *Allen Billing*, for the sum of 600*l.*, and costs of suit, with a defeazance, &c.: it was witnessed, that, in pursuance of the agreement, and in consideration of the sum of 300*l.* by the said *Thomas Lane* and *Allen Billing* paid to the said *Thomas Drinkwater* and *Robert Drinkwater*, they the said *T. Drinkwater* and *Robert Drinkwater* did thereby, for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, grant, covenant, and agree, to and with the said *Thomas Lane* and *Allen Billing*, their heirs, executors, administrators, and assigns, that they the said *Thomas Drinkwater* and *Robert Drinkwater*, their heirs, &c., should and would, from time to time and at all other times during the said term of ninety-nine years thence ensuing, if the said *Thomas Lane* and *Edward Lane* his son, and the said *Allen Billing* and *James Edward Billing* his nephew, or the survivors or longest liver of them, should so long live, at or in the *Guildhall* of the city of *London*, well and truly pay unto the said *Thomas Lane* and *Allen Billing*, their executors, administrators, or assigns, *one annuity or clear yearly sum of 30*l.*, in the shares and proportions following:* that is to say, the sum of 15*l.*, being one moiety of the said annuity or yearly sum, unto the said *Thomas Lane*, his executors, administrators, or assigns, and the sum of 15*l.*, the remaining moiety thereof, unto the said *Allen Billing*, his executors, administrators, or assigns,

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*Exch. of Pleas,* and the said moieties to be respectively paid by equal  
1834. quarterly payments, on the 30th of *January*, the 30th of  
*LANE* *April*, the 30th of *July*, and the 30th of *October*, in  
*a.*  
*DRINKWATER.* every year, the first payment of the *said annuity or yearly sum* to become due and be made on the 30th of *January* then next ensuing, provided the said term should be then continuing; and in case the said term should determine by the death of the said *Thomas Lane* and *Edward Lane*, *Allen Billing* and *James Edward Billing*, or the survivor of them, between or in the interval of any two of the quarterly days of payment, then, that the said *Thomas Drinkwater* and *Robert Drinkwater* should and would in like manner, in the moieties aforesaid, on demand thereof, well and truly pay or cause to be paid unto the said *Thomas Lane* and *Allen Billing*, their executors, &c., such part of the *said annuity or yearly sum* of  $30l.$ , as should be in proportion to the number of days which should have elapsed prior to the day of the decease of the survivor of them the said *Thomas Lane*, *Edward Lane*, *Allen Billing*, and *James Edward Billing*, and after the day of payment next or immediately preceding that event.

The indenture then further witnessed, that, in further performance of the agreement, and in consideration of the sum of  $30l.$ , paid by the said *Thomas Lane* and *Allen Billing* to the said *Thomas Drinkwater* and *Robert Drinkwater*, they the said *Thomas Drinkwater* and *Robert Drinkwater* did (according to their respective rights, estates, and interests therein,) grant, bargain, sell, release, and confirm, assign and transfer, unto the said *Thomas Lane* and *Allen Billing*, their heirs and assigns, a certain close of meadow or pasture ground therein mentioned, and also the several parts or shares of them the said *Thomas Drinkwater* and *Robert Drinkwater*, and each of them, of and in a certain sum of  $2800l.$  Three *per Cent.* Consolidated Bank Annuities, and a certain residuary estate of one *Thomas Drinkwater*, deceased, bequeathed to them respectively

by the will of the same *Thomas Drinkwater*, subject to the life estate of his widow therein, and all other the estate of the testator, to which the said *Thomas Drinkwater*, party thereto, and *Robert Drinkwater*, or either of them, were or might become entitled under or by virtue of the testator's will; to hold the said close of meadow ground and premises thereby granted, with the appurtenances, unto and to the use of the said *Thomas Lane* and *Allen Billing*, their heirs and assigns, for ever; and to hold the said parts and shares of them the said *Thomas Drinkwater* and *Robert Drinkwater*, and each of them, of and in the said Bank annuities and other residuary estate secondly thereinbefore described, unto the said *Thomas Lane* and *Allen Billing*, their executors, &c., upon the trusts thereinafter mentioned. And for enabling the said *Thomas Lane* and *Allen Billing* to recover and receive the several parts and shares of them the said *Thomas Drinkwater* and *Robert Drinkwater*, and each of them, of and in the said Bank annuities, residuary estate, and premises thereby assigned, the deed contained a power of attorney to the said *Thomas Lane* and *Allen Billing*, and the survivor of them, his executors, &c., to demand, sue for, recover, and receive of and from the executors for the time being of the therein recited will, or the person or persons liable to pay the same, the said parts and shares of them the said *Thomas Drinkwater* and *Robert Drinkwater*, and each of them, of and in the said Bank annuities, residuary estate, and premises thereinbefore assigned, and on payment thereof to give and sign receipts, &c.; and, on non-payment thereof, to commence, carry on, and prosecute any action, suit, or other proceeding for recovering and compelling payment thereof respectively. And it was thereby declared, that the said *Thomas Lane* and *Allen Billing*, their executors, &c., should stand possessed of and interested in the said close of land, parts and shares of Bank annuities, and other residuary personal estate and pre-

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mises, upon trust for better securing to the said *Thomas Lane* and *Allen Billing*, their executors, &c., the due and punctual payment of the said annuity or yearly sum of *30l.*, with a power to the said *Thomas Lane* and *Allen Billing*, their executors, &c., in case the annuity, or any part thereof, should be in arrear for twenty-eight days, by distress or sale of the close of land, or by transfer of the Bank annuities and residuary estate, to obtain payment of the annuity and all arrears thereof. The deed also contained the following proviso:—That in case the said *Thomas Drinkwater*, party thereto, and *Robert Drinkwater*, their heirs, executors, or administrators, or either of them, should at any time thereafter be desirous of redeeming or repurchasing the *said annuity, or yearly sum of 30l.*, and of such their or his intention should give unto the said *Thomas Lane* and *Allen Billing*, their executors, administrators, or assigns, *seven days' notice in writing*, then, that the said *Thomas Lane* and *Allen Billing*, their executors or administrators, should and would, *at the expiration of the said notice, on receiving all arrears of the said annuity*, and all costs and charges paid or incurred by them in the premises, *accept, receive, and take the sum of 307l. 10s. as and in full for the repurchase or redemption of the said annuity*, and, on receipt thereof and of all arrears of the said annuity as aforesaid, deliver up the said indenture to be cancelled, and at the costs and charges of the said *Thomas Drinkwater* and *Robert Drinkwater*, their executors or administrators, acknowledge, or cause to be acknowledged, on record, satisfaction of the judgment which should be entered up upon the warrant of attorney, and release and re-assign the said close of meadow ground, stocks, parts and shares of Bank annuities, residuary estate and premises, or such part thereof as should not have been disposed of under the trusts aforesaid, unto the person or persons so redeeming or repurchasing the said annuity, as he or they should direct; and in such case

the said annuity thereby granted, and all remedies for enforcing the same, should cease, determine, and be void.

The indenture mentioned in the second count was the grant of an additional annuity of 10*l.*, to be paid in moieties of 5*l.* each, exactly as in the first grant, with the like powers and proviso for redemption.

At the trial, before *Alderson*, B., at the *London* Sittings after last *Trinity* Term, it was proved, that the defendant, *Thomas Drinkwater*, had paid the arrears of the annuity and the purchase money to one *Blayney*; but the defendant failed in proving *Blayney's* agency and authority to receive the money; whereupon the jury found a verdict for the plaintiff on both issues.

On an early day in this term, *F. N. Rogers* obtained a rule to shew cause why the judgment should not be arrested, or why a repleader should not be awarded, or why the judgment should not be entered for the defendant *non obstante verdicto* on the second issue.

*Kelly* and *Ball* shewed cause.—*First*, it is said that the covenant in this deed is a joint covenant, and that the action ought to have been brought in the name of both the cointainees, and that, therefore, the judgment ought to be arrested. But the whole of the covenant must be read together; and although the words in the early part of the covenant would make it a joint covenant with both the cointainees, yet the subsequent words “in the shares and proportions following, *viz.* the sum of 15*l.*, being one moiety of the said annuity, unto the said *Thomas Lane*, his executors, &c., and the sum of 15*l.*, the remaining moiety thereof, unto the said *Allen Billing*, his executors, &c.,” clearly shew that the interest is several; and, where the interest is several, the covenant must be taken to be several also. That is expressly laid down by Mr. Serjt. *Williams* in the notes to *Eccleston v. Clipsham* (a), where

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(a) 1 Saunders, 153, n.

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he says, "So, though a man covenant with two or more jointly, yet, if the interest and cause of action of the covenanteees be several and not joint, the covenant shall be taken to be several, and each of the covenanteees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." So, in *James v. Emery* (a), it was held, that, "if the interest of covenanteees be several, they may maintain several actions, although the language of the covenant be that of a joint covenant." And that decision was afterwards affirmed on error in the *Exchequer Chamber* (b). And in *Owston v. Ogle* (c), the same principle was recognised and acted upon. [Alderson, B.—In *Servante v. James* (d), a covenant by the master of a vessel with the several part-owners and their *several and respective* executors, administrators, and assigns, to pay certain monies to them, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, *and in such parts and proportions* as were set against their several and respective names, was held to be a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action.] That was only carrying the same principle still further. [Parke, B.—If the principle contended for be correct, then it was a grant of two annuities; and ought not this deed to have been stamped with several stamps?] It is now too late to take that objection, as it was not taken at the trial. The case of *Withers v. Bircham* (e) is strongly in point; there, by deed, reciting the previous grant of two distinct annuities to *A.* and *B.*, during the life of the grantors and the survivor, it was witnessed that *C.* covenanted with *A.* and *B.*, and their executors, to pay the annuities, or either of them, when the grantors should make default in payment. *A.*

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|------------------------------------------|---------------------|
| (a) 8 Taunt. 245.                        | (c) 13 East, 538.   |
| (b) 5 Price, 529; 2 Moore,<br>195, S. C. | (d) 10 B. & C. 410. |
|                                          | (e) 3 B. & C. 254.  |

died; and it was held, that, the interest in the annuities being several, the covenant was also several; and that the annuity granted to *A.*, being in arrear, his executor might maintain an action against *C.* *Secondly*, as to the replication, the plaintiff has not taken issue on the acceptance only, but also traverses the non-payment of the arrears and the repurchasing of the annuity by either the defendant or *Robert Drinkwater*, according to the deed. If any of those allegations are true, then it is an answer to the plea. It is not necessary to argue, whether the replication be double or not, as that objection can only be taken on special demurrer. The plaintiff has in express terms denied that the annuity was repurchased; and it is equally clear that he has denied the non-payment of the arrears of the annuity. The terms of the deed are clear, that it is to be on the performance of both those conditions that the deed is to be delivered up to be cancelled, and that the annuity, and all remedies for enforcing the payment of it, are to cease and determine. It is, therefore, not an immaterial issue.

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*Merewether*, Serjt., and *F. N. Rogers*, in support of the rule.—*First*, as to the arrest of judgment. The principle which has been stated, that, where the interest is several, the parties may sue severally, is correct; but it is submitted, that, according to the true construction of all the provisions contained in this deed, the interest of the covenantee is joint and not several. The consideration appears to be joint, for it is recited in the deed to have been paid by both. The covenant is, to pay *one* annuity of 30*l.*, and the undertaking is to pay to the two covenantees, their heirs, executors, administrators, or assigns, not their *respective* heirs, executors, administrators, or assigns. The words “in the shares and proportions following,” &c., only point out a mode of payment, and do not operate as a severance of interest. The repurchase money is also to be paid in

*Exch. of Pleas,* one sum to *both*; and the terms "several" and "respective" in the deed, though frequently applied to the grantors, are never applied to the plaintiff and *Billing*; the conclusion from which must be, that the interest of the covenantees was intended to have been joint. The subsequent part of the covenant, requiring the annuity to be paid in moieties to each, merely pointed out a mode of payment for the convenience of the parties, and could not have the effect of making the interest several. The case of *Withers v. Bircham* was the case of a guarantie of two separate annuities which had been previously granted, and, therefore, it was clear, that the interest was several. This is not so strong a case as *Anderson v. Martindale* (a), where a covenant to and with *A.*, his executors, &c., and to and with *B.* and her assigns, to pay an annuity to *A.*, his executors, &c., during *B.*'s life, was held to be a joint covenant to *A.* and *B.*, in which they had a joint legal interest, although the benefit was for *A.* only. There Lord *Kenyon* says, "There is no distinguishing *Slingsby's* case from the present. There *Beckwith*, by indenture, covenanted, promised, and agreed to and with *William Vavasor* and *Francis Slingsby*, and to and with *George Harvey* and *Frances* his wife, and their assigns, and to and with each of them, (*quolibet et quilibet eorum*), that he, *Beckwith*, at the sealing and delivery of the indenture, was lawfully and sole seised of a certain rectory; and, in an action of covenant thereon by *Slingsby* and his wife, the issue was found for the plaintiff, and judgment obtained thereon in *B. R.*; but, on a writ of error brought in the *Exchequer Chamber*, that judgment was, on great deliberation, reversed, because the other covenantees had not joined in the action with the plaintiffs, and they alone could not maintain the action, notwithstanding the words 'et ad et cum quilibet et quilibet eorum.' And this distinction was

(a) 1 East, 497.

taken, which appears to be very sensible, that, where every of the covenantees is to have a several interest or estate, there the addition of the words '*cum quolibet eorum*,' will make the covenant several in respect of their several interests." In that case, the covenant was with *A.* and *B.* to pay an annuity to *A.*; in the present case, the covenant is with *Lane* and *Billing* to pay them *one* annuity. There seems to be no case in which the covenant has been held to be several, where words of severalty have not been introduced; but, as applicable to *Lane* and *Billing*, there are none here. *Secondly*, the material part of the plea has not been traversed. The plea states all that is required by the annuity deed to effect a repurchase. The plea states the money to have been paid by and with his consent, and that makes averment of acceptance and repurchase immaterial; because the proviso expressly says, that, on payment of the money, all remedies shall cease and determine; and, therefore, the acceptance and satisfaction was unnecessary and immaterial.

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*Cur. adv. vult.*

The judgment of the Court was afterwards delivered by PARKE, B., who, after stating the pleadings and the annuity deed, proceeded as follows:—Upon this record three objections were made. *First*, that, notwithstanding the finding on the second issue, the replication admitted a sufficient part of the plea to bar the action; and, therefore, that the defendant was entitled to judgment *non obstante veredicto*; *secondly*, that, if this was not so, there was an immaterial issue; and, *thirdly*, that the action could not be brought by this plaintiff alone, and therefore the judgment ought to be arrested. The last objection is, in the opinion of the Court, well founded, and it is, therefore, unnecessary to give any opinion on the others, though we have no difficulty in saying that they would not have

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prevailed. The rule is clearly established, that, though a man covenants with two or more persons, using words which *prima facie* import a joint covenant, yet, if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage. *Eccles. v. Clipsham* (*a*). The question is, whether the interest in the money covenanted to be paid in this case is in the plaintiff and *Billing*, or an interest in a moiety in the plaintiff only; if in both, the covenant is joint, and the action cannot be brought by the plaintiff alone.

Upon referring to the deed set out on *oyer*, it appears to us, that it is a grant of and covenant to pay one *entire annuity* of *30l. per annum* to the plaintiff and *Billing*, one moiety of which is to be received by each, and not a grant of or covenant to pay two several annuities of *15l.* to the plaintiff and *Billing* respectively. Throughout the deed it is called *one* annuity; it is granted in consideration of a sum paid by both; it is secured by a warrant of attorney to confess a joint judgment at the suit of both, by a grant to both of the reversion of a close of land and of a sum of money in the funds, with a joint power of attorney to recover it; and on seven days' notice to both, both covenant to receive one entire sum in full for the annuity, and, on receipt thereof and of the arrears, to deliver up the deed to be cancelled. We, therefore, think that it is but *one* annuity, and the covenant with two to pay it in moieties is a joint covenant. We do not mean to say, that, if the deed had contained two distinct grants of two several annuities to the plaintiff and *Billing*, the circumstance of these annuities being collaterally secured by joint grants and authorities, or even redeemable by one joint payment, would

have made the covenant with both to pay these annuities a joint covenant; but, when we find express words describing it as *one* annuity, coupled with these provisions, we cannot doubt as to the effect of the deed. We, therefore, think that the interest in this case is in effect a joint interest in one entire annuity ; and, consequently, the words of the covenant with the plaintiff and *Billing* must be taken in their ordinary sense, and constitute a joint covenant, on which the plaintiff alone cannot sue, and the judgment must therefore be arrested.

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Judgment arrested (*a*).

(a) In *Byrne v. Fitzhugh* and Another, which was an action upon an agreement, whereby the defendants, in consideration of the plaintiff and one Beckett using their endeavours to charter ships, and to procure passengers on board them, and not engaging with any other emigrant brokers, the defendants undertook to pay the plaintiff and Beckett a commission of 5 per cent. on the amount of the net passage money made by the ships, one half to be paid to the plaintiff, and the other half to Beckett. The case was referred at the Lancaster Summer Assizes, 1834, and the arbitrator raised on his award the question whether Beckett should not have been a co-plaintiff in the action.

The case was argued in Michaelmas vacation before *Patteson*,

J., and *Gurney*, B., as two of the Judges (b) of the Court of Common Pleas at Lancaster, by *Milner* for the plaintiff, and *Alexander* for the defendants, who cited the above case as in point, and urged that the contract was joint, and, consequently, that Beckett ought to have been joined as co-plaintiff in the action, and that a nonsuit should be entered ; and of that opinion were the two Judges, *Patteson*, J., saying that, even without the case cited, he should have thought that the contract was joint, and could not, therefore, be sued upon by the plaintiff alone. The only doubt which could have been raised was on the words, giving half the commission to each. That point was in effect, however, determined by *Lane v. Drinkwater*. Nonsuit entered accordingly.

(b) See ante, p. 598.

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CANAL COMPANY v. SUMMERS HARFORD, Esq., and  
Others.

Trespass for breaking and entering, on the 1st January, 1830, and on divers other days and times, &c., one close, called the Railroad, and one other close formerly used as a railroad, &c. Pleas (amongst others), that *A.*, *B.*, and *C.* were owners of the closes on each side of the *locus in quo*, which was a railway made by the plaintiffs under the authority of an act of Parliament; that the adjoining closes con-

TRESPASS for breaking and entering, on the 1st January, 1830, and on divers days and times, two closes of the plaintiffs, *viz.* one close called the Railroad, and the other close abutting &c., and which said last-mentioned close was formerly used as a railroad or railway; and damaging the earth and soil of the said closes respectively, and tearing up the roads, &c., and converting and disposing of the materials. Second count for an *asportavit*. Pleas—*First*, the general issue. *Second*, soil and freehold. *Third*, that the closes in which &c. were and are certain closes made and maintained by the plaintiffs as part of a railway, under the provisions of a certain act of Parliament made in the 32nd year of King *George 3*, for making and maintaining a navigable cut or canal from &c., and a collateral cut or canal from &c., and for making and

tained minerals, and that, according to the custom of the country, the minerals could only be conveniently conveyed by means of a railroad across the *locus in quo*. The plea then justified the trespasses for that purpose, and for the convenient and necessary occupation of the adjoining closes. Replication, protesting the soil and freehold, *de injuriis abque residuo caesi*. Another plea alleged that the occupiers of the adjoining closes had, for twenty years, *as of right*, and without interruption, used and been accustomed to use the privilege and easement of passing and repassing, &c., and laying down railroads across the plaintiffs' railroad. Replication to this plea, traversing the claim of right. New assignment of other and different purposes, to which there was judgment by default.

The particulars complained of trespasses committed by the defendants in April and May, 1830, in a close "which now is or heretofore was a rail or tramroad," and destroying the plates of the same, and laying down others. The evidence was, that the defendants, in February, 1829, took up some of the plates of the plaintiffs' railway, and altered the course of part of it, carrying it over their own land, and made a transverse railroad, which crossed the site of the old railroad, and also the new railroad:—*Held*, that the particulars were sufficient.

Upon the issue with regard to the more convenient occupation of the adjoining closes, there was much evidence on both sides, the plaintiffs giving evidence to shew, that, in constructing the transverse railroad, the defendants had an ulterior object in view. The Judge left it to the jury to say, whether the transverse railroad was constructed *bond side* for the more convenient occupation of the closes, or for some other object:—*Held*, that this direction was right.

Upon the issue with regard to the twenty years' enjoyment of the easement:—*Held*, that the defendants were bound to shew an uninterrupted enjoyment, as of right, during that period; and that the plaintiffs might prove, under that issue, applications by the defendants during the twenty years for leave to cross their railroad, and that it was not necessary for them to reply such licence specially under 2 & 3 Will. 4, c. 71, s. 8.

maintaining railways or stone roads from such cuts or canals to several iron works or mines in the counties of *Monmouth* or *Brecknock*, and that the said closes in which &c. then and there formed and were a part and used as a part of such railway under and by virtue of the said act of Parliament, and of certain other acts of Parliament, &c. (for extending the road); and before, and at the said times when &c., the plaintiffs were in possession of the several closes in which &c., without having at any time obtained or taken from the person or persons who were or are seized thereof as of fee, or otherwise entitled thereto, any conveyance of the freehold estate or interest of such person or persons. And the said defendants say, that, before the several times when &c., certain persons, to wit, *Richard Summers Harford*, *John Harford*, and *William Weaver Davis*, were and still are seized in their deimesne as of fee of and in certain, to wit, twenty closes next adjoining the said closes in which &c., on one side &c., and twenty other closes next adjoining &c., on the other side, and that before and at the time of the passing of the said acts of Parliament, and before and at the said several times when &c., the said closes so adjoining &c. were closes containing large quantities of minerals of a valuable nature, and were chiefly valuable on that account; and the owners and occupiers thereof were and are in the habit of digging and obtaining therefrom divers large quantities of minerals, and that it was and is usual and proper, in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram carts, and in and along a tramroad constructed for the purpose, and that the same could not conveniently or properly be carried or conveyed in any other manner, nor could such closes so respectively adjoining &c. be otherwise conveniently occupied; and thereupon, before and at &c., it became and was necessary, reasonable, and proper that the

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*Exch. of Pleas,* said *R. S. H., J. H.,* and *W. W. D.* should make and  
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erect certain tramroads across the said closes, in which  
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&c., in different parts thereof, for the purposes of carrying  
and conveying from their said closes on one side thereof, to  
their said closes on the other side thereof, minerals dug  
and gained by them from such their said closes, and for  
the necessary and more convenient occupation and use of  
their said several closes respectively for the said pur-  
poses; wherefore the said defendants, as the servants and  
by the command of the said *R. S. H., J. H.,* and *W. W.*  
*D.*, at &c., for the purpose of making the said tramroads  
across the said closes in which &c., broke and entered &c.,  
and made across the same such tramroads, for the purposes  
aforesaid, from the said closes of the said *R. S. H., J. H.,*  
and *W. W. D.*, on one side of the said closes in which &c.,  
to their said closes on the other side thereof. And the  
defendants, as such servants, and by such command, at the  
said times when &c., used the said tramroads, so by them  
made, in carrying and conveying in tram carts, from and to  
such respective closes of the said *Richard Summers Har-*  
*ford, John Harford, and William Weaver Davis*, divers  
minerals, their property, and by them dug and gained from  
such their closes respectively, and in so doing the defen-  
dants, at the said times when &c., necessarily and una-  
voidably, with feet in walking, a little trod down, trampled  
upon, consumed, and spoiled the grass of the plaintiffs  
growing on their said closes in which &c., and tore up,  
subverted, damaged, and spoiled the earth and soil of  
the said closes in which &c., and tore up, prostrated,  
and destroyed a small part of the said roads and paths  
of the plaintiffs, and the materials thereof, coming,  
to wit, the said iron, earth, and rubbish in the first  
count mentioned in that behalf, and the said goods and  
chattels in the second count, seized, took, and carried to  
a small and convenient distance, and there left the same

for the use of the plaintiffs, and also then and there cut, dug, and made in and upon the closes in which &c. the said excavations and the said roads and paths so alleged to have been cut, dug, and made by them; and the defendants, as such servants, and by such command, on these occasions, and for the purposes aforesaid, also then and there necessarily put, placed, and laid, and caused to be put, placed, and laid, in and upon part of the closes in which &c., the iron, stones, earth, and rubbish in the said first count lastly mentioned, the same being materials necessary and proper for making such tramroads so made across the closes in which &c., and there kept and continued the same from thence hitherto, as the defendants lawfully might, for the cause aforesaid, doing no unnecessary damage to the said plaintiffs, and the use and enjoyment of the said closes in which &c., for the purposes of a railway, under the said acts of Parliament, not being thereby hindered or obstructed, and this the defendants are ready to verify. Wherefore they pray judgment, &c. The fourth, fifth, sixth, and seventh pleas were similar to the third in substance, but varied in the mode of stating the purposes for which the way was claimed. The eighth plea claimed a way similar to that claimed in the third plea, by virtue of a reservation in a grant of the *locus in quo*, made by one *Glover* to the plaintiffs; this plea became immaterial. The ninth, tenth, and eleventh pleas were variations of the eighth. The twelfth plea was of a grant of the way (by lost deed) from the plaintiffs to certain persons, under whom the defendants justified. The thirteenth plea was similar, stating the way to be for the convenient occupation of the adjoining lands. The fourteenth plea stated, that, for twenty years and upwards next before the commencement of this suit, and before either of the said times when &c., the occupiers for the time being of certain, to wit, twenty

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*Exch. of Pleas,* closes adjoining the closes in which &c., on one side  
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said several closes in which &c., were and are lands or closes containing divers large quantities of minerals of a valuable nature, and were valuable chiefly on that account, and the owners and occupiers thereof were in the habit of digging and obtaining therefrom divers large quantities of minerals. And the defendants further say, that it was and is usual and proper in that part of the country where the said several closes were and are situate, to carry and convey such minerals in tram carts, and in and along a tram-road constructed for the purpose; and that the same could not conveniently or properly be carried or conveyed in any other manner, nor could such closes so adjoining the closes in which &c. be otherwise conveniently used and enjoyed for the purposes last aforesaid, and thereupon before, and at the said several times when &c., it became and was necessary, reasonable, and proper, and did not obstruct, and was not inconsistent with such use and enjoyment of the said closes in which &c., as a railway, under the said acts of Parliament, that the said *R. S. H.*, *J. H.*, and *W. W. D.* should make and erect certain tram-roads across the said closes in which &c., in different parts thereof, for the purposes of carrying and conveying from their said closes on one side thereof, to their said closes on the other side thereof, minerals dug and gained by them from such their said closes respectively, and for the necessary and more convenient occupation and use of their said several closes respectively, for the said last-mentioned purposes. Wherefore the said defendants, as the servants, and by the command of the said *R. S. H.*, *J. H.*, and *W. W. D.*, at the said several times when &c., for the purpose of making such tramroads across the said closes in which &c., and of using the last-mentioned way, broke and entered the said closes in which &c., and then and there made across the same such tramroads, for the purposes aforesaid, from the said closes of the said *R. S. H.*,

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*Exch. of Pleas, J. H., and W. W. D.*, on one side of the said closes in  
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which &c., to their said closes on the other side thereof; and the defendants, as such servants, &c. The fifteenth plea was similar to the fourteenth, claiming the easement for the purpose of carrying earth, &c., from the adjoining closes. The sixteenth plea stated, that, for fifty years and upwards next before either of the said times when &c., the occupiers for the time being of certain, to wit, twenty closes, near the closes on which &c., on one side thereof, being also occupiers of divers, to wit, twenty other closes, on the other side of the closes in which &c., of right and without interruption have had and used, and have been used and accustomed to have and use, and of right during that time, and at the said times when &c., were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., on foot, and with horses and tram carts, for the purposes of the convenient occupation of such respective closes, so being near the closes in which &c., and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes, on one side of the closes in which &c., being also the occupiers of the said other closes, on the other side of the closes in which &c., from time to time, when necessary, to make tramroads across such parts of the closes in which &c., as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing across the closes in which &c., as last aforesaid, so as they should not obstruct or do any thing inconsistent with the use and enjoyment of the said closes in which &c., as a railway, under the said acts of Parliament; and the defendants further say, that long before and at the said times when &c., the said R. S. H., J. H., and W. W. D., were occupiers, as well of the said last-mentioned closes on one

side of the closes in which &c., as of the said last mentioned closes on the other side thereof; and the defendants aver, that, before and at the said several times when &c., it became and was necessary, reasonable, and proper that the said *R. S. H.*, *J. H.*, and *W. W. D.* should make and erect certain tramroads across the said closes in which &c., in different parts thereof, for the purpose of using and enjoying the said last-mentioned liberty, easement, and privilege. Wherefore the said defendants, as the servants and by the command of the said *R. S. H.*, *J. H.*, and *W. W. D.*, at the said several times when &c., for the purpose of making such tramroads across the said closes in which &c., for the said purposes, broke and entered the said closes in which &c., and then and there made across the same such tramroads for the purposes last aforesaid; and the defendants as such servants &c. The seventeenth plea was similar to the sixteenth, but claiming the right for the occupiers of land on *one* side only. The eighteenth plea was similar to the sixteenth, except in claiming the way to exist at the free will and pleasure of the occupiers. The four remaining pleas became immaterial. Replications to the third, fourth, fifth, sixth, and seventh pleas—The plaintiffs, after protesting the seisin of *R. S. H.*, *J. H.*, *W. W. D.*, replied *de injuriis absque residuo cause*. To the twelfth and thirteenth they replied by traversing the grant. To the fourteenth plea they replied as follows: that although true it is, that the said *R. S. H.*, *J. H.*, and *W. W. D.* were occupiers, as well of the said last-mentioned closes on one side of the close in which &c., as of the said last-mentioned closes on the other side thereof, in manner and form as the said defendants have in their said fourteenth plea in that behalf above alleged; protesting, nevertheless, that, for twenty years and upwards next before the commencement of this suit, and before either of the said

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times when &c., the occupiers for the time being of the said twenty closes adjoining the closes in which &c., on one side thereof, being also the occupiers of the said twenty other closes adjoining to and on the other side of the closes in which &c., of right and without interruption have not had and used, and have not been used and accustomed to have and use, nor of right during that time, or at the said times when &c., were entitled to have and use the liberty, easement, and privilege of passing and repassing across the said closes in which &c., in such parts thereof, as should be necessary and convenient, from and to such respective closes so adjoining, and being on each side of the closes in which &c., on foot, and with horses and carts, for the purpose of carrying minerals, the produce of such respective lands and other things, from and to such respective closes so adjoining the closes in which &c., and for the more convenient use, occupation, and enjoyment of such last-mentioned closes, with liberty and power to such occupiers for the time being of such closes, on one side of the closes in which &c., being also the occupiers of the said other closes on the other side of the closes in which &c., to do and perform in and upon the closes in which &c., all such things as should be necessary for the purposes of enjoying and using the liberty, easement, and privilege of passing and repassing across the closes in which &c., as last aforesaid, and as should not obstruct or be inconsistent with the use and enjoyment of the said closes in which &c., as a railway, under the said acts of Parliament, in manner and form as the said defendants have in their said fifteenth plea in that behalf above alleged. Protesting also, that the said closes, so adjoining the said several closes in which &c., were not nor are lands or closes containing minerals of a valuable nature, nor valuable chiefly on that account; neither were the owners and occupiers thereof in the habit

of digging and obtaining therefrom minerals, in manner and form as the said defendants have in their said fourteenth plea in that behalf above alleged. Protesting also, that it was not, nor is usual or proper, in that part of the country where the said several closes were and are situated, to carry and convey such minerals in tram carts, and in and along a tramroad, constructed for the purpose, in manner and form as the said defendants have in their said fourteenth plea in that behalf above alleged. Protesting also, that the said defendants, at the said several times when &c., were not the servants, nor acted by the command of the said *R. S. H.*, *J. H.* and *W. W. D.*, as in that plea mentioned: For replication, nevertheless, in this behalf to the said fourteenth plea, the said plaintiffs say, that the said defendants, at the said several times when &c., of their own wrong, and without the residue of the cause by them in their said fourteenth plea alleged, committed the said several trespasses in the said declaration mentioned, in manner and form as the said plaintiffs have above in their said declaration complained against them the said defendants, and this &c. To the sixteenth plea the plaintiffs replied, that, for twenty years and upwards next before the times when &c., the occupiers of the said twenty closes, near the closes in which &c., on one side thereof, being also the occupiers of the said twenty closes on the other side &c., of right and without interruption have not had nor used, and have not been used and accustomed to have and use, nor of right during that time &c. were entitled to have and use the liberty, easement &c. There were similar replications to the seventeenth and eighteenth pleas. As to the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, and 20th pleas, the plaintiffs new assigned that the trespasses were committed on other and different occasions, and for other and different purposes

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*Eccles. of Pleas,* &c., and in a greater degree and quantity, &c., and to a greater extent &c., than was necessary. To this new assignment the defendants suffered judgment to go by default.

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The following were the particulars of the trespasses alleged to have been committed:—

This action is brought by the above-named plaintiffs, to recover from the above-named defendants damages for the following trespasses, the first of which trespasses was committed by the defendants in the months of *April* and *May*, 1830, by breaking and entering into or upon a certain close, which is or was heretofore a rail or tramroad, situate and being in the parish of *Bedwelly*, in the county of *Monmouth*, running across a certain common or close there called *Pen Mark*, and turning up, subverting, pulling to pieces, and destroying a certain part of the first-mentioned close, and the plates and other materials of the first-mentioned close, and carrying away and converting the said plates and materials to the defendants' own use; and laying down other plates and other works in and upon the first-mentioned close, in, upon, over, and across the first-mentioned close, and making or laying down a transverse tram or railroad across and over the said last-mentioned close, and rendering it altogether unfit for use; and for other trespasses of a similar nature and description to those hereinbefore mentioned, committed by the said defendants in and upon another part of their said first-mentioned close, in or about the month of *June* last; and also for other trespasses of a similar nature or description, committed by the defendants on the said last-mentioned part of the said close, at two several times, and on two several occasions, in the month of *July* last. And for continuing the said several trespasses, so by the defendants committed, from the respective times of committing the same hitherto.

The cause was tried before *Alderson*, B., at the last

assizes for the county of *Hereford*, when the following appeared to be the facts of the case:—The plaintiffs, who were incorporated by the stat. 32 Geo. 3, (amended by the 37 Geo. 3,) soon after the passing of those acts, completed the canal which they were thereby authorized to make. The defendant *S. Harford* was the managing agent of a large iron manufactory, called the “*Selhowy Estate*;” the defendant, *C. H. Harford*, of a similar manufactory, called “*Ebber Vale*;” and the two other defendants were workmen employed by the defendant *S. Harford*. The plaintiffs also constructed a railway, in pursuance of a power to that effect in the act, from their canal to the *Selhowy* works. That railway intersected the *Selhowy* estate, and consisted merely of the usual iron plates laid down on the surface of the land, without being fenced in on either side. For the use of this railway the proprietors of the works paid a large sum of money as tonnage to the plaintiffs.

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By an act passed in the 33 Geo. 3, another canal company was established in the same neighbourhood, and another canal, called the *Brecon* and *Abergavenny* Canal, was constructed. That act contained a clause, (commonly called the eight mile clause), authorizing the owners or occupiers of mineral lands, &c., within the distance of eight miles from such canal, to call upon the company to make railways therefrom to such lands, and, in case of omission, authorizing the owners of the lands to make the same. In the year 1831, the proprietors of the *Selhowy* estate called upon the company, under this clause, to make a railway from the canal to a colliery on their estate, called the *Pen Mark* Colliery. Before the time had expired for the *Brecon* and *Abergavenny* company to make their election with regard to the proposed railway, the proprietors of the *Selhowy* estate caused a railway to be laid down in the same line as that proposed to the *Brecon* and *Abergavenny* canal company, and crossing the railway of the plaintiffs,

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being from one part to another part of the *Selhowy* estate. This was effected by taking up one or two plates of the plaintiffs' railway on each side, and laying down others in their stead, constructed in such a way as to answer the double purpose of crossing and travelling along the line.

In the month of *February*, 1829 (a), the defendants, without the knowledge of the plaintiffs, took up a considerable part of the plaintiffs' railroad, and turned the course of it in a different direction, to enable them, as they alleged, to work away some minerals under the former site. The crossing railroad ran over both the old and the new line.

The plaintiffs, to prove their ownership, gave in evidence a conveyance in 1795 (b), the notices given by the owners of the *Selhowy* estate to the *Brecon* canal company, in which the railway was called the Railway of the *Monmouthshire* Canal Company, and also an admission of their title by the defendants' attorney at the time of a view, which was made of the premises. The plaintiffs contended, that the railroad of the defendants was not, as alleged in the pleas, constructed for the purpose of the more convenient use of their closes on each side of the plaintiffs' railroad, but for an ulterior object, *viz.* that of opening a communication with the *Brecon* canal (c). In answer to the case of the defendants, upon the issue on the 16th plea, the plaintiffs tendered evidence of applications made on behalf of the defendants, within the last twenty years, for leave to put down railways across that of the plaintiffs. This evidence was objected to by the defendants, on the ground that the issue joined was only whe-

(a) The particulars stated that these trespasses were committed in April and May, 1830. The taking up of the railroad was in fact the trespass for which the action was brought.

(b) Nothing turned upon this.

It appeared that the deed had not been inrolled according to the provisions of the local act.

(c) This evidence is particularly noticed in the judgment, post, p. 634.

ther the defendants had exercised the right without interruption for twenty years, and that it was, therefore, not competent to the plaintiffs to give evidence to shew that the enjoyment was only permissive, which, it was contended, ought to have been made the subject of a special replication.

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The defendants contended, *first*, that the plaintiffs must be nonsuited, on the ground that they had not proved the trespass as stated in the particulars, which confined the trespass to the new road, to the ownership of which there was no proof that the plaintiffs were entitled. That all that they could claim on the new road was an easement, in respect of which trespass could not be maintained, the soil and freehold being clearly in the parties named in the second plea; and even with respect to the old road, the defendants contended that there was no evidence to shew that the plaintiffs were entitled to more than an easement. *Secondly*, with regard to the issues upon the pleas involving the question of obstruction, the defendants urged, that there was no evidence to shew that their merely crossing the railroad was any obstruction to the occupation of it by the plaintiffs. *Thirdly*, they produced a considerable body of evidence to shew that their railway was necessary and useful for the proper enjoyment and occupation of the property on each side of the plaintiffs' railroad; and that it had not been constructed with the view suggested on the part of the plaintiffs, but *bona fide* for the purposes above mentioned.

The learned Judge refused to nonsuit the plaintiffs, on the ground of the variance between the evidence and the particulars; but gave the defendants liberty to move to enter a nonsuit on that ground. He left four questions to the jury; *first*, whether the soil and freehold of the old railroad was in the plaintiffs; *secondly*, whether there was any general right in the defendants to put down crossings on the plaintiffs' railroad where they pleased;

*Exch. of Pleas,* *thirdly,* whether there had been any obstruction of the plaintiffs' railroad by the defendants; and, *lastly,* whether what had been done by the defendants was what a reasonable man would have done for the convenient occupation of the closes on each side of the plaintiffs' railroad. That, with regard to the latter point, it was for them to say, whether the acts of the defendants were done for the *bona fide* occupation of the land; that the defendants undertook to prove that the crossing was made for that purpose, and if the jury doubted whether the land could be conveniently occupied without it, they should find upon those issues for the defendants. (The learned Judge then commented on the evidence given on behalf of the defendants on this point). He said, that the plaintiffs, on the contrary, insisted that the crossings were made for a totally different purpose than the convenient occupation of the closes, *viz.* for the purpose of effecting a junction with the *Brecon* canal. He then remarked upon the evidence for the plaintiffs; and told the jury, that the question was, whether the railroad made by the defendants was reasonable, necessary, and proper for the occupation of the closes. The jury found for the plaintiffs upon all the points submitted to them by the learned Judge.

*Maule* now moved for a nonsuit, or for a new trial—The first point for the defendant is, that the plaintiffs ought to have been nonsuited on the ground of a variance between the declaration, and the particulars, and the evidence. The declaration states, that the defendants broke and entered, on the 1st *January*, 1830, and on divers other days and times, &c., a close called the Railroad, and another close (describing it) formerly used as a railroad. The particulars confine the trespasses to a close which *is*, or heretofore was, a railroad, and refer only to *one* close. The only close which is a railroad is the new or substituted railroad, while all the evidence given applied to the old railroad. [Alderson, B.—It was admitted

that the soil and freehold of the land on which the substituted railroad was constructed were the soil and freehold of *Harford* and the others; the plaintiffs, therefore, were obliged to rest their case upon the trespasses committed on the old railroad.] With regard to the latter trespasses, there is a material variance between the particulars and the evidence in the dates. The particulars state those trespasses to have been committed in *April and May*, 1830; while, upon the evidence, it appears that they were committed in *February*, 1829. [Lord *Lyndhurst*, C. B.—The words in the particulars, “which is or was heretofore a rail or tramroad,” shews that the plaintiffs did not intend to confine the trespasses to the new railroad. The evidence was, that the defendants broke and entered a close which was theretofore a railroad, and that trespass was within the particulars. *Parke*, B.—There was no doubt as to which close the particulars applied. The defendants could not be misled.] The next objection is, that the plaintiffs did not prove their right to the soil and freehold of the old railroad. [*Alderson*, B., had reported that he was not dissatisfied with the finding of the jury upon this point, and it was not pressed.] Another objection is, that the question with regard to the obstruction of the railroad was left to the jury, when, in fact, no issue upon that point was raised by the pleadings, except upon the new assignment, on which judgment had been suffered by default. [*Alderson*, B.—In the third plea the defendants, after justifying the trespasses, and alleging no unnecessary damage, proceed thus—“the use and enjoyment of the said closes in which &c., for the purposes of a railway under the said acts of Parliament, not being thereby hindered or obstructed.” I directed the jury, upon this part of the case, to consider first, whether the defendants had proved the first part of the third plea, *viz.* whether the acts done by the defendants were for the more convenient occupation of the closes; that, if they found they were not, their verdict should be for the plaintiffs;

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but if, on the contrary, they should be of opinion that the acts done were for the more convenient occupation of the closes, then they should find whether or not there had been any hindrance or obstruction by the defendants, that question only becoming material upon the former question being found in favour of the defendants. The jury having found against the defendants on the former question, the latter has become immaterial.] The next point is, that the learned Judge admitted improper evidence upon the issue joined on the sixteenth plea. That issue is, that the occupiers of the closes have not of right used, and been accustomed to use, the railroad for twenty years without interruption, for the convenient use and occupation of their closes. The plaintiffs traversed the mere enjoyment; and there was abundance of evidence on the part of the defendants to shew that enjoyment for twenty years. But, under this traverse of the enjoyment only, the plaintiffs were permitted to give evidence of a fact which was not in issue, *viz.* that the enjoyment had been with their licence and permission. The licence and permission were quite consistent with the fact of the simple enjoyment, and ought, according to the provisions of the statute 2 & 3 Will. 4, c. 71, s. 5, to have been specially replied (a).

(a) By which statute it is enacted, "that, in all pleadings wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and, if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that, in all pleadings to actions of tres-

pass, and in all other pleadings, wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act, as may be applicable in this case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the

[*Parke, B.*—The issue is, whether the occupiers of the closes, *of right and without interruption*, have had the use and enjoyment for twenty years, as they insist, under this issue, therefore they must shew an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright v. Walker* (*a*), lately decided in this Court, it was held, that the claimant must shew that he has enjoyed the way for the full period of twenty years, and that he has done so *as of right and without interruption*, and that such claim might be answered by proof of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years. In the present case, the permission asked for and given shews that the occupiers of the closes did not enjoy the way “as of right,” and also that they did not enjoy it uninterruptedly (*b*). *Lord Lyndhurst, C. B.*—The simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence negativing the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken.] The last

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other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause, or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.”

(*a*) 1 Cr. M. & R. 211.

(*b*) “Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have enjoyed it, but by stealth, as a trespasser would have done if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed ‘as of right.’” *Ante, p. 219.*

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point is, that the learned Judge misdirected the jury, in leaving it to them to consider, whether the defendants made the railroad *bond fide* for the convenient use and occupation of their closes, on each side of the plaintiffs' railroad, or for some ulterior object. [Alderson, B.—There was a great body of evidence on both sides with regard to this part of the case; and the way in which I left it to the jury was this, whether they believed that the acts in question were done with the view taken by the witnesses for the plaintiffs, or with that taken by the witnesses for the defendants—whether the acts were done with a view to the proper and necessary use and enjoyment of the closes, or with a view to some ulterior object, not referable to such use and enjoyment.] It was left to the jury as a question of *bona fides*. [Alderson, B.—My direction was intended to contrast the evidence on both sides, so as to enable the jury to say, whether, upon the whole of the evidence, it appeared that the acts were done for the purpose of the occupation and enjoyment of the closes.] The question as to any ulterior object which the defendants might have had in view ought not to have been left to the jury at all. There was no evidence given that this was a railroad which would serve any ulterior purpose; nor, if it had appeared that the defendants had some ulterior object, was that any ingredient in the case for the consideration of the jury? The question was, whether the circumstances authorized the defendants to make the railroad, not what purposes they might possibly put it to when made. Even had they admitted some ulterior object, it would not have rendered the act illegal, if in other respects they were entitled by law to do it; in the same manner as a man may distrain for one cause, and avow for another (a). It is true, that the case

(a) *Butler & Baker's case*, 3 Rep. 454; *Anon.* Godb. 110; *Crowther* 26, a; *Fitz. Ab. Avowry*, pl. 232; *v. Ramsbottom*, 7 T. R. 654. *Groenveld v. Purwell*, 1 Ld. Raym.

of *Lucas v. Nockells* (*a*) may be cited as an authority against the objection now contended for; but one of the learned Judges (*b*) dissented from the judgment. [Lord *Lyndhurst*, C. B.—The real question is, did the defendants require this railroad for the proper occupation of their close? if they did, any ulterior object was immaterial; but it was not immaterial to shew an ulterior object, with the view of proving, that in fact the defendants did not require the road for the occupation of their closes, but that that was merely done colourably, for the purpose of effecting an ulterior object. *Parke*, B.—Suppose the defendants had said in words, “We do not require the railroad for the convenient occupation of our closes;” would not that have been admissible evidence upon this issue; and how does it differ from giving their conduct in evidence, which amounts in fact to a declaration? Lord *Lyndhurst*, C. B.—We will consider whether there ought to be a rule on this point.]

The judgment of the Court was delivered on a subsequent day by—

**PARKE, B.**—In this case the Court, after giving their opinion on the other grounds of the motion for a new trial, took time to consider one of the points suggested by Mr. *Maule*, *viz.* that the learned Judge, in summing up to the jury, directed them to consider whether the defendants *bond fide* intended the two tramroads, which crossed the railway of the plaintiffs, (and which formed the subject of the trespass complained of), for the convenient and beneficial occupation of their lands *inter se*, or whether their

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(*a*) 10 Bingh. 157.

(*b*) Mr. Baron *Parke*. The same case is reported in Clarke and Finelly. See *Governors of Bristol Poor v. Wait*, 1 Ad. & Ell. 264; 3 Nev. & M. 359, S C.

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sole object in making them was to carry into effect another and different plan, totally unconnected with such occupation; and we think that in so doing he was right, and that there ought not to be a new trial on this ground. The issue for the jury was, in substance, whether the defendants' closes could not be conveniently occupied without making a tramroad across the plaintiffs' railway; and whether it was reasonable and proper for the defendants so to do, for the purpose of carrying the minerals across from the one close to the other. On the part of the plaintiffs, Mr. *Mushett* and Mr. *Bevan*, as witnesses, were called, men well acquainted with the management of such concerns, who stated that it was by no means necessary, or even advantageous for the defendants, so to conduct their works. In addition to this evidence, the plaintiffs adduced the testimony of a surveyor, Mr. *Davis*, who deposed to the fact, that, in 1825, he had made a survey for the defendants, for the purpose suggested by the plaintiffs as the real and sole purpose of the defendants; and that the point where the then projected tramroad crossed the plaintiffs' railway very nearly, if not exactly, coincided with that subsequently adopted by them in 1830, for the alleged purpose of the convenient occupation of their lands. He also stated, that negotiations, connected with the same ulterior object, were even yet going on, on the part of the defendants. There was evidence also, that the tramroad in question was of larger dimensions than could properly be required for the mere occupation of the lands *inter se*; and that in another part of the works, whence much larger quantities of materials were derived, and larger masses of rubbish deposited, but which was unconnected with the ulterior object, a plan nearly agreeing with that suggested by Messrs. *Mushett & Bevan* had been actually adopted by the defendants themselves. It is undoubtedly true, that, in answer to this, a large and

important body of evidence was laid before the jury by the counsel for the defendants. The two men, by whom the tramroads were laid out and made, negative any intention of carrying into effect the supposed ulterior object of the defendants, or any orders from the defendants to that effect; and many ironmasters of high respectability and great experience also testified, that, in the management of the defendants' estate, they should have adopted for its convenient occupation alone, the very plan carried into effect by the defendants. Upon this issue the *bond fide* intention of the defendants seems to us admissible for the consideration of the jury. We think that it tends to shew that the making a tramroad across the plaintiffs' railway was not, in the opinion of the defendants themselves, necessary or convenient for the occupation of their closes; for it shews that their sole object was different from that stated by them in their pleas. The circumstances referred to, as demonstrative of their real intention, may be considered as equivalent to a declaration by the defendants, that, in making the tramroad, their sole purpose was to go to the *Trevill* Quarry and the *Brecon* Canal, and that they did not really want such tramroads for the convenient occupation of their lands at all. Now such a declaration would undoubtedly have been evidence on this issue against the defendants; and, under the circumstances of the conflict of evidence in this case, we think this a circumstance which might properly weigh with the jury when they deliberated on their verdict. We are also of opinion, that, as the facts from which such intention was sought to be inferred were opened by the counsel for the plaintiffs and relied on, and afterwards adduced in evidence without any objection to their admissibility on the part of the counsel for the defendants, and, as their counsel made observations on that evidence in opening their case to the jury, and called witnesses to explain and contradict it, it does not lie in the mouth of either of the parties now to object to the effect of that evidence

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being commented on by the learned Judge, and considered by the jury. We think, therefore, that there should be no rule in this case.

Rule refused.

**GLADWELL v. WILLIAM BLAKE, THOMAS AUGUSTUS SWAYSLAND, and HENRY SOLomon.**

The stat. 5 Geo. 4, c. 18, s. 6, authorizing constables to execute any warrant of any justice, &c., within any parish, &c., situate within the jurisdiction for which the justice shall have acted in granting the warrant, though not directed to them by name, and notwithstanding the parish, &c., in which such warrant shall be executed, shall not be the parish for which he shall be constable, does not apply to warrants issued by the Judges of the Court of King's Bench, but is confined to warrants issued by justices of the peace, having a limited jurisdiction only.

Where a bench warrant, issued by a Judge of the Court of King's Bench, was executed by a constable to whom it was not directed, out of his own d' an action of trespass against the constable, that the plaintiff was not bound to and copy of the warrant, under the 24 Geo. 2, c. 44, s. 6.

**TRESPASS** and false imprisonment.—The declaration stated, that the defendants, on the 10th of December, 1833, with force and arms &c., assaulted the plaintiff, to wit, in the county of Middlesex, and with great force, &c., pulled and dragged him about, and forced and compelled him to go from and out of a certain church, situate in the county aforesaid, into the public street there, and forced and compelled him to go in and along divers public streets to a certain police-office, situate in the county aforesaid, and then and there detained and imprisoned him, and kept and detained him in prison without any reasonable or probable cause whatsoever. The defendants pleaded, *first* not guilty. *Secondly*, that, before and at the time of the making of the warrant as thereinafter mentioned, at the sessions of oyer and terminer of our lord the King, holden in and for the county of Middlesex, at the Sessions House for the said county, on the 2nd of September, 1833, the plaintiff was and then stood indicted for wilful and corrupt perjury, in his examination as a witness before the Right Honourable John Singleton, Lord Lyndhurst, Chief Baron of his Majesty's Court of Exchequer, in a certain cause, wherein Sarah Bloomfield was plaintiff, and the said William Blake, Emanuel Cohen, the said Thomas Augustus Swaysland, and the said Henry Solomon were de-

fendants, to which indictment the plaintiff had not then appeared or pleaded ; and it had been then and there ordered by the said Court, that the plaintiff should enter into recognizance in 200*l.*, with two sureties in 100*l.* each, and that forty-eight hours' notice of bail should be given to Mr. *Spyer*, of No. 30, *Broad Street Buildings, London*, solicitor for the prosecution, before the same should be taken. And the defendants, in fact, further say, that before the said time, when &c., to wit, on the 10th of *September*, 1833, the premises aforesaid having been certified to the Honourable Sir *John Patteson*, Knt., one of his Majesty's justices of the Court of our lord the King, before the King himself, by the clerk of the said session for the said city, the said Sir *John Patteson*, so being such justice, duly made and issued his certain warrant, under his hand and seal, bearing date the day and year last aforesaid, directed to *Thomas Gibbons*, gentleman, tipstaff, or any other tipstaff of his Majesty's Court of *King's Bench*, and to all chief and petty constables, headboroughs, tithing-men, and all others whom the said warrant might concern; and thereby willed and required, and in his Majesty's name strictly charged and commanded them, and every of them, on sight thereof, to apprehend and take the body of the plaintiff and bring him before the said Sir *John Patteson*, or one other of the Judges of the said Court of *King's Bench*, if taken in or near the cities of *London* or *Westminster*, if elsewhere, before some justice of the peace near to the place where he should be therewith taken, to the end that the plaintiff might become bound, and also find sufficient sureties for his personal appearance at the next session of the peace of our lord the King, to be holden in and for the county of *Middlesex*, to answer to the said indictment according to the due course of the said Court, and to be further dealt with according to law; and the defendants further say, that afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, in the county aforesaid, the said warrant was delivered to the

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said *Henry Solomon*, who then, and from thence, and until and at the said time when &c., was a constable and peace-officer in and for the county of *Sussex*, in due form of law to be executed; by virtue of which said warrant he, the said *Henry Solomon*, so being such constable and peace-officer as aforesaid, and the said *William Blake*, and *Thomas Augustus Swaysland*, in his aid and assistance, and by his command, afterwards, to wit, at the said time when &c., that is to say, on the day and year last aforesaid, gently laid their hands on the plaintiff, in order to apprehend and take, and did then and there apprehend and take the plaintiff into the custody of the said *Henry Solomon*, until the plaintiff afterwards, and as soon as conveniently could be, was carried and taken to and before the said *Sir John Patteson*, for the purposes aforesaid, in and by the said warrant specified; and under and by virtue of the same, and on the occasion aforesaid, the plaintiff was necessarily and unavoidably forced and compelled by the defendants to go from and out of the said church into the said public street there, and was also forced and compelled by them, the defendants, to go in and along the said public street to the said police-office, and was also necessarily and unavoidably imprisoned, and kept and detained for the said space of time in the said declaration mentioned, which are the said supposed trespasses in the said declaration mentioned, and whereof the plaintiff hath complained against them.

To this plea, the plaintiff (after protesting that he did not stand indicted for perjury, and that it had not been ordered by the court of session that the plaintiff should enter into recognizances, the warrant of *Mr. Justice Patteson*, and that the other defendants acted in aid of the defendant *Solomon*,) replied, that the defendants of their own wrong, and without the residue of the cause in the second plea alleged, committed the trespasses in the declaration mentioned.

At the trial, before Lord *Lyndhurst*, C. B., at the Sittings at *Westminster*, after last *Trinity Term*, the facts alleged in the second plea were proved, and it was also proved that the defendant *Solomon* was chief constable of *Brighton*, in *Sussex*. *Ball*, for the defendants, objected that the plaintiff ought to be nonsuited, on the ground that there was no proof of a demand of a copy and perusal of the warrant made by the plaintiff upon the defendant *Solomon*, according to the 24 *Geo. 2*, c. 44, s. 6, or that the verdict should be entered for the defendants under the stat. 5 *Geo. 4*, c. 18. Lord *Lyndhurst*, C. B., overruled the objection, saying, that he thought those statutes did not apply to the present defendants, and accordingly directed the jury to find a verdict for the plaintiff, which they accordingly did to the amount of 40*s.*; his Lordship, however, gave the defendants leave to move to enter a verdict for them.

*Follett* having on a former day in this term obtained a rule accordingly—

*Bompas*, Serjt., now shewed cause.—*First*, the defendants are not protected by the statute 24 *Geo. 2*, c. 44, s. 6, as this case does not come within the provisions of that statute, because that statute applies only to a warrant under the hands of a justice of the peace, and does not apply to a bench warrant. The words in that statute are, that “no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any *justice of the peace*, unless demand shall have been made of the perusal and copy of such warrant.” That statute, therefore, applies only to a warrant issued by a justice of the peace. [The Court then desired him to consider the question as to the 5 *Geo. 4*, c. 18, s. 6.] *Secondly*, the defendants

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are not protected by the statute 5 Geo. 4, c. 18, s. 6, as that statute has only reference to the term "justice of the peace," mentioned in the former statute, and did not authorize the defendant *Solomon*, who was a constable of *Sussex*, in executing this warrant in the county of *Middlesex*, and out of his own district. That act is intituled "An Act for the more effectual recovery of penalties before justices and magistrates, on conviction of offenders, and for facilitating the execution of warrants by constables;" and it was passed in consequence of the decision in *Rex v. Weir* (a), where a magistrate's warrant was directed "to A. B., to the constables of *W.*, and to all other his Majesty's officers;" and it was held that the constables of *W.*, the names not being inserted in the warrant, could not execute it out of the district of *W.* The sixth section of the 5 Geo. 4, c. 18, begins by reciting—"And whereas warrants addressed to constables, headboroughs, tithingmen, borsholders, or other peace officers of parishes, townships, hamlets, or places, in their characters of and as constables, headboroughs, tithingmen, borsholders, or other peace officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice;" and for remedy thereof it enacts, "that it shall and may be lawful to and for each and every constable, and to and for each and every headborough, tithingman, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices, magistrate or magistrates, *within any parish, township, hamlet, or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted* when granting such warrant or warrant, or when backing or indorsing any such warrant or warrants, in such and the like manner as if such warrant or warrants had been ad-

(a) 1 B. & Cress. 288; S. C. 2 D. & R. 444.

dressed to such constable, headborough, tithingman, bors-  
holder, or other peace officer specially by his name or  
names, and notwithstanding the parish, township, ham-  
let, or place in which such warrant or warrants shall be  
executed shall not be the parish, township, hamlet, or place  
for which he shall be constable, headborough, tithingman,  
or borsholder, or other peace officer, provided that the  
same be within the jurisdiction of the justice or justices,  
magistrate or magistrates so granting such warrant or war-  
rants, or within the jurisdiction of the justice or justices,  
magistrate or magistrates by whom any such warrant or  
warrants shall be backed or indorsed." That statute,  
therefore, gives authority to any constable to whom a war-  
rant is directed to execute it out of his district; but that is  
confined to warrants issued by justices of the peace, and  
does not apply to bench warrants, issued by a Judge of  
the Court of *King's Bench*. The statute was merely in-  
tended to remedy the evil which the decision in *Rex v.*  
*Weir* had pointed out, and that decision was upon a war-  
rant issued by justices of the peace. The words in the act,  
to execute any warrant "of any justice or of any magis-  
trate, *within any parish, &c.*, situate, lying, or being within  
that jurisdiction for which such justice, &c., shall have acted,"  
cannot have reference to the magistrate who granted this  
warrant, because he had a general jurisdiction, and is not  
a magistrate "for any parish;" and this statute was clearly  
meant to remedy an evil which applied to persons having  
a limited jurisdiction only, and not to a Judge of the Court  
of *King's Bench*, who has a general jurisdiction. A  
Judge of the Court of *King's Bench* does not back or in-  
dorse warrants; and the term "magistrate" in the act, it  
is manifest, is used synonymously with justice of the  
peace, and does not apply to a Judge of that Court.  
There is a wide distinction between a Judge of a Court,  
acting judicially in granting a bench warrant, and a justice

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of the peace, as the former is totally free from responsibility. A chairman of a Court of Quarter Sessions, in granting a warrant, acts in a different capacity from that of justice of the peace; but even if not, this is a much stronger case. It is submitted that the learned Judge, in granting this warrant, acted as a Judge of the Court of *King's Bench*, as the warrant requires the plaintiff to be brought before some Judge of that Court, if taken within *London or Middlesex*, but, if elsewhere, before a justice of the peace. The Judges possess the authority of conservators of the peace, as subservient to their office of Judge. If Judges were justices of the peace, they would be called upon to act as such; but that has never been done. Mr. Justice *Patteson*, in granting this warrant, did not exercise his authority as a justice of the peace, but as a Judge of the Court of *King's Bench*. The term "justice of the peace" has a distinct meaning in the statute; and this act is intituled "An act for the more effectual recovery of penalties before justices and magistrates on conviction of offenders," and the Court will not extend the meaning of the words to include a person having a higher jurisdiction. If a verdict were entered for the defendants on this plea, it would be no answer to the action, and the plaintiff would still be entitled to judgment *non obstante veredicto*.

*Follett* in support of the plea.—The plea states that an indictment had been found against the plaintiff for perjury; and it is submitted, that over such an offence any justice of the peace would have had jurisdiction to issue a warrant to hold a party to bail, and that in this instance the learned Judge acted in that capacity. A distinction has been attempted to be drawn between conservators of the peace and justices of the peace, but no such distinction exists. The Judges of the Court of *King's Bench*

have a general common law authority, as justices of the peace, and may exercise that authority throughout *England*. The words of this act are not only "justice of the peace," but any "magistrate," and that will apply to a Judge of the Court of *King's Bench*. The legislature have used words ample enough to embrace every magistrate, and the Court will not confine it by construction to magistrates having a limited jurisdiction only. There is nothing in the act to confine it to justices of the peace; and a warrant issued by a Judge would be equally within the mischief intended to be remedied by it. [Alderson, B.—This is not the same as if the warrant had been directed to the constable by name. If it had, there would have been no doubt as to the constable's jurisdiction. *Rex v. Weir* decided that.] In *Gimbert v. Cayney* (a), it was held, that this statute put warrants, addressed to *peace officers in their official character*, on the same footing on which warrants addressed to them by name stood previously. Here the warrant was directed to *all constables*; and the defendant *Solomon* being a constable has executed it in the county of *Middlesex*, which it is submitted he was authorized in doing. It is true that the statute applies to cases where a warrant may be indorsed or backed, but it also applies to cases where it is not necessary to indorse them. *Secondly*, it is not open to the plaintiff to move to enter up judgment *non obstante veredicto*. This being a transitory action, the plaintiff ought to have replied that the defendant *Solomon* was not a constable of the county of *Middlesex*, and that the warrant was executed there. For any thing that appears on the record, the arrest may have taken place in the county of *Sussex*, as *London* or *Middlesex* may mean elsewhere in a transitory action. If the plaintiff had meant to take

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this point, it is submitted that he should have replied accordingly. [Parke, B.—The defendant *Solomon* ought to have averred that he was acting within his jurisdiction; his plea is defective in not doing so.] *Thirdly*, the stat. 24 Geo. 2 applies to the present case. The constable was bound to execute the warrant, delivered to him for that purpose, within the jurisdiction of the Judge who granted the warrant; and he had a general jurisdiction, not confined to the county of *Sussex*, but extending to the county in which the warrant was executed. If a Judge of the Court of *King's Bench* acted beyond his authority in granting a warrant, an action would lie. If he granted a warrant improperly, the constable who executed it would be entitled to the same protection as if it had been granted by any other justice of the peace. Neither in one statute nor the other is there any thing to confine it to a warrant granted by a justice of the peace.

Lord LYNDHURST, C. B.—On looking at the act of Parliament, and considering the different clauses contained in it, I am of opinion, that the legislature never intended to apply it to the judges of the superior Courts, but to persons only having the limited jurisdictions which are there expressed. I am of opinion, therefore, that there must be judgment for the plaintiff *non obstante veredicto*, for no demand of a perusal and copy of the warrant was necessary.

PARKE, B.—I concur in the opinion which has been delivered by the Lord Chief Baron. Looking to the act of Parliament, I consider that it was only intended to apply to justices of the peace with limited jurisdiction. If the legislature had intended to include the Judges of the Court of *King's Bench*, they would have mentioned them expressly. The act does not extend the constable's authority beyond

what he had power to do by a bench warrant before it passed. Then *Rex v. Weir* shews that the constable is confined to his own district in executing a warrant. The plea must be found for the defendants, because it is proved; but it is bad in substance, as it does not aver that the constable acted within his jurisdiction, and therefore the plaintiff is entitled to judgment *non obstante veredicto*. A demand of a copy of the warrant is only necessary where the constable acts within his jurisdiction in obedience to the warrant, which he did not do in the present case.

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**ALDERSON, B., and GURNEY, B., concurred—**

Verdict to be entered for the plaintiff on the general issue, and for the defendants on the special plea, and then judgment for the plaintiff thereon *non obstante veredicto*.

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### DIXON *v.* LEE.

**ALEXANDER** had obtained a rule *nisi* for an attachment against *Anne Dixon*, for not attending as a witness on the trial of this cause at the last *Lancaster* assizes.

**Cresswell** shewed cause, and objected that it did not appear on the affidavit, upon which the rule was obtained, that the witness had been called upon her *subpoena*. In

to the amount, as being insufficient. On shewing cause against a rule for an attachment against her, it appeared that she had an infant in bad health at the breast; and that the inside fare of the coach from *Liverpool* (the road through which town was the most convenient route to *Lancaster* from the place where she resided) was 1*l.* 1*s.* The Court thought that she might reasonably require an inside place, and that the money was insufficient, and they refused to make the rule absolute for an attachment against her. *Semel*, that the affidavit for an attachment for not appearing as a witness, in pursuance of a *subpoena*, need not shew that the witness was called in Court on the *subpoena*, especially if the witness never did attend the assizes.

The wife of a publican, living sixty miles from *Lancaster*, was subpoenaed to give her evidence at the assizes there, and 2*l.* 2*s.* was given to her for expenses. She did not make any objection

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*Malcolm v. Ray* (a), it was held that the affidavit, upon which the rule for an attachment is moved, must distinctly state that the witness was called upon his *subpœna*. There the crier had indorsed upon the *subpœna* that he had called the witness; but the Court held such indorsement not sufficient, and that the fact must appear on the affidavit. [Parke, B.—Since the case of *Barrow v. Humphries* (b), that case cannot be quoted as an authority. Gurney, B., referred to *Mullet v. Hunt* (c). Alderson, B.—There might be this distinction between *Malcolm v. Ray* and the present case. In *Malcolm v. Ray* the witness had been in Court, and therefore the Court might have thought it necessary to call upon him when he was wanted. Here the witness never went to the assize town. There may be a distinction between the case of a witness who does attend, and a witness who does not attend, in pursuance of the *subpœna*. In the one case it might be of use to call him; in the other, there can be no object in doing so.]

Cresswell then stated, that, seeing the impression of the Court, he would not press that objection; but he submitted, upon the affidavits which he produced, that the present was not a case in which the Court, in the exercise of their discretion, would make the rule for an attachment absolute. It appeared that the witness was the wife of a publican, living at *Rainhill*, about sixty miles from *Lancaster* and eleven miles from *Liverpool*; that the road which she would have taken as most eligible would be by going round by *Liverpool*, from whence to *Lancaster* the inside fare in a coach was 1*l.* 1*s.*; that she would have had to remain at *Lancaster* three days, and that she had an infant at the breast, which infant was in a bad state of health, and it appeared that the money left with her was

(a) 3 Moore, 222. See same case in a subsequent stage, *nomine Malcolm v. Day*, 3 Moore, 579.

(b) 3 B. & Ald. 598.  
(c) 1 C. & M. 752.

only 2*l.* 2*s.* He submitted that the party wishing for the attendance of a witness should, previously to the witness setting out, supply her with sufficient to go, remain, and return.

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*Alexander, contra*, contended that, if the sum were insufficient, the witness ought so to have stated when it was paid to her; and, at all events, that she ought not to have kept the money if she did not intend to attend.

The Court intimated that the witness ought to have stated that the sum was insufficient when it was paid to her; but they said, that, in her situation in life, and under the circumstances in which she was placed, it was not unreasonable that she should require an inside place; and, that the money furnished not being enough for her expenses, they thought that the present was not a case in which an attachment ought to issue; and that the rule should be discharged without costs.

Rule discharged without costs.

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#### JOHNSON v. BUDGE.

THIS case was entered for trial at the sittings which commenced on November the 17th, and were adjourned to the 19th of November. On the night of the 18th the defendant died, and *Platt*, on the evening of the 19th, applied to Mr. Baron *Bolland*, who was sitting at *Nisi Prius*, to adjourn the sittings to some day in term, that the cause might be tried within the term. The learned

Where a defendant died in the course of the sittings in term, the Court refused to allow the cause to be tried on the last day of term to which the sittings had been adjourned for that purpose; and entering the

nor would they interfere, by appointing for the trial another day out of term, verdict as of the sittings in the term.

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Judge, having to sit elsewhere in the intermediate time, fixed the last day of term, and adjourned the sittings to that day, that the cause might then be taken, if the Court should think that such a course ought to be pursued, but he desired that the Court should be applied to on the subject.

*Platt* now applied to have the cause taken on the last day of term, or to have it taken some day out of term as of term. He contended, that, if the cause were tried at any time within the sittings in the course of which the cause was tried, the plaintiff might recover the fruits of his verdict; and he stated that the *postea*s were made up as of the first day of the sittings, at which period the defendant was alive. [*Parke*, B.—I am afraid that there would be a great difficulty in either course which you propose. The officer states that the *postea*s are not now made up as of the day of trial. It is impossible that the cause can be taken on the last day of term, as it would greatly interfere with the course of the public business; it can only be taken out of term by consent.]

*Hoggins* and *Wortley*, who had been instructed for the defendant in the cause, stated that they could not consent. The attorney felt that there was no person for whom he was now authorized to consent. They urged that the cause ought not to be taken out of its course; and that, if it were now tried, and a verdict found for the plaintiff, the course of the administration of assets would be affected in a way which would be unfair and prejudicial to the other creditors of the deceased.

*Per Curiam*.—We cannot interfere.

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**DECLARATION** in *assumpsit* for goods sold and delivered, and on an account stated. Plea as follows:—And the said defendant as to all the said supposed promises in the said declaration mentioned, except as to the sum of 20*l.* 9*s.*, parcel of the said monies in the said declaration mentioned, says that he did not promise in manner and form as the plaintiff hath above thereof complained against him, and of this the defendant puts himself upon the country &c.; and as to the said sum of 20*l.* 9*s.*, parcel of the said monies in the said declaration mentioned, the said defendant says, that, after the making of the said supposed promises in the said declaration mentioned, as to the sum of 20*l.* 9*s.*, and before the commencement of this suit, to wit, on &c., the defendant was in bad and embarrassed circumstances, and indebted to the plaintiff in the said sum of 20*l.* 9*s.*, parcel &c., and to divers other persons respectively in divers large sums of money, and was unable to pay the said plaintiff, and the said other creditors of the defendant respectively, their debts in full, whereof they then had notice; and thereupon the defendant then offered and agreed with the plaintiff, and the said other creditors of the defendant, to pay to them respectively, and the plaintiff and the said other creditors then mutually agreed with each other and with the defendant to accept of him, 5*s.* in the pound, as a composition upon and in full satisfaction and discharge of their respective debts, such composition to be paid by the defendant to the plaintiff and the said other creditors of the defendant respectively, as follows, to wit, half thereof down, and the remainder, in divers to wit six months then following; and the plaintiff and the said other creditors of the defendant then mutually agreed with the defendant not to proceed against the defendant for the recovery of

The defendant pleaded to an action of *assumpsit*, as to all except 20*l.* 9*s.*, non *assumpsit*; and as to that sum, that the defendant being in embarrassed circumstances, the plaintiff and other creditors agreed to take 5*s.* in the pound, and that the defendant was ready and willing to pay the amount of the composition, but the plaintiff refused to receive it, and discharged the defendant from tendering or paying the composition:—

*Held*, that the plea was no answer as to the sum agreed to be taken for composition, as no consideration was stated for the plaintiff's discharging the defendant from the payment of it.

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the residue of the said respective debts and demands, unless default should be made in payment of such composition. And the said defendant further saith, that the composition or sum of 5*s.* in the pound on the said sum of 20*l.* 9*s.*, amounts to a large sum, to wit, the sum of 5*l.* 2*s.* 3*d.*; and that he the said defendant, at the time of the making of the said agreement in the plea mentioned, and always from thence hitherto, hath been and still is ready and willing to pay to the said plaintiff the said composition on the said sum of 20*l.* 9*s.*, parcel &c., but to receive the same or any part thereof of the defendant he the said plaintiff hath always wholly refused; and the plaintiff then discharged the said defendant from tendering or paying to him the said plaintiff the said composition at the times for payment thereof, or at any other time, and this the defendant is ready to verify, &c. To this plea there was a demurrer and joinder in demurrer.

*W. H. Watson*, in support of the demurrer.—The plea is bad in substance and in form. *First*, in form:—the agreement is pleaded in the early part of the plea, as a mutual agreement, to accept the composition in accord and satisfaction; but the defendant does not go on to shew an acceptance in accord and satisfaction, as he ought to have done, and therefore the plea is bad for want of that averment. Neither does it appear that the 5*l.* 2*s.* 3*d.* was paid to the plaintiff, nor that any thing has been done equivalent thereto. Another objection to the form of the plea is, that it is pleaded to the whole of the sum of 20*l.* 9*s.*, whereas it should have been pleaded to the 20*l.* 9*s.* minus the 5*l.* 2*s.* 3*d.* The plea if bad in part is bad for the whole. [*Alderson, B.*—The defendant admits a right in the plaintiff to 5*l.* 2*s.* 3*d.* He does not say that he has paid it to the plaintiff, or that he has tendered it and paid it into Court, and that 5*l.* 2*s.* 3*d.* is still

so much money due for goods sold, or on an account stated. He was then stopped by the Court.

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**Ross, contrà.**—The agreement set forth in the plea leaves the defendant liable to pay the sum of 5*l.* 2*s.* 3*d.* on that agreement. But the remedy for the original debt is gone, and the plaintiff must proceed under the agreement for composition. [Parke, B.—Would not this agreement be evidence of an account stated?] It is submitted that it would not; the remedy should be by special *assumption* on the agreement.

**PARKE, B.**—In an action for goods sold and delivered could not the plaintiff, without declaring specially on the agreement, recover the 5*l.* 2*s.* 3*d.* on the account stated? If that is so, then the defendant has not answered the whole of the declaration. There is no answer as to the 5*l.* 2*s.* 3*d.*, except that the plaintiff discharged the defendant from paying it, and he has shewn no consideration for that. You had better amend the plea, and plead it as to the residue *minus* the 5*l.* 2*s.* 3*d.*, and pay that sum into Court.

Leave to amend on payment of costs, and producing an affidavit of merits.



#### BLIGH and Another, Executors, v. BREWER.

**I**N this case *Crowder*, on a former day in this term, had obtained a rule to shew cause why the *cognovit* given by the defendant in this cause, and the judgment and execu-

Where a defendant in custody was about to execute a *cognovit*, and the defendant's at-

torney being absent from home, the plaintiff's attorney suggested another attorney to act for him, to whom the defendant made no objection, but went to his office, and on being asked by that attorney if he wished him to attest the execution as his attorney, answered in the affirmative:—*Held*, that this was an express naming of the attorney, within the meaning of the 72nd rule of Hilary Term, 2 Will. 4.

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tion thereon should not be set aside, on the ground that the *cognovit* had not been properly executed, pursuant to the 72nd rule of *Hilary Term, 2 Will. 4.* By that rule it is required, that "no warrant of attorney to confess judgment or *cognovit actionem*, given by any person in custody of a sheriff or other officer, upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney."

It appeared from the affidavits in answer to the motion, that the defendant was arrested on the 2nd of *July* at the suit of the plaintiffs, on a promissory note, and on the day of the arrest, went to the office of the plaintiff, who was an attorney at *Bodmin*. There his own attorney, Mr. *Coode*, came to see him, and as there was some hesitation as to whether or not the defendant would defend the action, Mr. *Coode* left him and went out of town. The defendant afterwards agreed to give a *cognovit* for the debt and costs, and a Mr. *Johns*, the plaintiff's clerk, was instructed to prepare one. He did so, but informed the defendant that an attorney must be present on his behalf, to attest the execution. It was a matter of dispute whether the defendant at first wished to have Mr. *Coode* or not, but as he was not in the way, *Johns* said he had just seen Mr. *Cummins*, and that he would attend if the defendant had no objection; to which the defendant replied, that he did not care much who it was. *Johns* went to request the attendance of *Cummins*, and the defendant made no objection. They afterwards proceeded to *Cummins's* office, who inquired of the defendant, whether he wished him to attest the execution of the *cog-*

***novit*** as his attorney? To which the defendant answered in the affirmative, and prevented him from reading over the ***cognovit***, as he stated he had already heard its contents.

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*Humphrey* shewed cause, and contended that there had been a substantial compliance with the rule; and therefore that the *cognovit* was valid.

*Crowder*, contra, urged that the rule had not been complied with, as there was no attorney expressly named by the defendant attending on his behalf, since *Cummins* was never named by him, nor requested by him to attend. *Hutson v. Hutson* (a), *Walker v. Gardner* (b), *Fisher v. Pananicholas* (c).

**PARKER, B.**—In this case everything which the rule demands has been complied with. The rule requires three distinct things:—*first*, that there shall be an attorney attending on the behalf of the person in custody; *secondly*, that it shall be a different person from the plaintiff's attorney; and *thirdly*, that he shall be expressly named by the defendant, and shall attend at his request. Now, in this case, it appears that the defendant having consented to give a *cognovit*, the clerk of the plaintiff told him that an attorney must be present for him, and suggested that **Mr. Cummins** was in Bodmin. He replied he did not care who it was, he had no objection to him. I do not say how it would have been if it had stopped there; but the defendant went to *Cummins's* office, and *Cummins* asked him if he wished to have him as his attorney, to which he answered in the affirmative. The rule requires the attorney to be expressly named by the person in custody. It seems to me, that this case comes within those words; for it is

- (a) 7 Term Rep. 7. (b) 4 Barn. & Adol. 371.  
(c) 2 C. & M. 215.

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the same thing, whether the defendant states affirmatively that he adopts him as his attorney, or says in the first instance, I wish you to be my attorney. The arrangement of the words cannot make any difference. Then did he act at his request? It is immaterial whether the attorney comes to him, or he goes to the attorney, if he gets him actually to see to the transaction. The object of the rule is, that he shall be informed of the effect of the act, and there is no necessity for the attorney's reading over the *cognovit*, if the party be already acquainted with it. Here the attorney was a different person from the plaintiff's attorney; he was expressly named by the defendant, and attended at his request. In *Fisher v. Papanicholas*, the defendant said nothing; he merely made no objection. And in *Gardner v. Walker*, the conversation, by which the acquiescence of the defendant was supposed to be proved, was denied; and therefore the Court must be presumed to have treated the case as though such conversation had not existed.

BOLLAND, B.—I am of the same opinion. I think that the rule is complied with, though the defendant should be considered as not having expressly named the attorney. He went to *Cummins's* office and subscribed the *cognovit*; that would not have been enough, unless he had adopted the proposal of *Cummins* as his attorney. If there be not affirmative words, it does not come within the rule; but I think there is a strict compliance therewith, if a party is asked whether such a person shall be his attorney, and he says yes.

ALDERSON, B.—The attorney must be expressly named by the defendant, and the fact of his nomination must not be left to mere inference. In *Gardner v. Walker* the nomination was only to be inferred from the circumstance

of the defendant having afterwards paid him; so in *Fisher v. Papanicholas*, there was merely an inference arising from the party making no objection. The rule does not require that the individual named should be mentioned; it is sufficient, if he is the person particularly appointed. Here nothing is left to inference if we believe the affidavits. There is then an express naming, and this distinction will reconcile all the cases.

Exch. of Pleas,  
1834.  
—  
BLIGH  
v.  
BREWER.

GURNEY, B., concurred.

Rule discharged, with costs.

#### LEWIS v. DAVISON.

IN this case *Mansel* had obtained a rule to shew cause why the writs of *capias*, *exigent*, and proclamations, and other proceedings to outlawry, against the defendant, should not be set aside, with costs, for irregularity.

On a motion to set aside proceedings to outlawry, on the ground that the writ of *capias* varied from the form given by the Uniformity of Process Act, it appeared that the writ was

sued out by the plaintiff in person, and that the indorsement on the writ was—"This writ was issued by C. L., of No. 6, *Berners Street, Brunswick Square*, the plaintiff within-named, in person;" the form given by the act being "who resides at," &c. The writ was filed on the 4th of *June*, and might have been seen by the defendant at any time afterwards in the office:—*Held*, that it was too late in M. T. to take advantage of the objection, even if it were maintainable, though it was positively sworn that the plaintiff never knew of the outlawry till six weeks before.

*Held* also that it was a mere irregularity in the writ, and that the objection ought to have been taken by summons at chambers.

In this case the writ was issued on the 17th of *April*, and was returned *non est inventus* on the 4th of *June*, the practice being that it could not be returned within four months except under a judge's order:—*Held*, that it was no objection to the writ that it was returned before the four months expired, as it was not necessary to state the judge's order in the writ, and that it must be assumed it was done correctly.

*Held* also, that the *exigent* is not a writ within the meaning of the 12th section of the Uniformity of Process Act.

The writ of *exigent* directed the proclamations to be made at the parish church of the parish in which the defendant resided:—*Held*, that it was sufficient, it not appearing from any affidavit that there was any nearer church or chapel; and that, at all events, it was not necessary to mention that in the *exigent*.

*Exch. of Pleas,* aside by the rule, and therefore no objection as to the irregularity of the writ and proceedings can be gone into.

1834.  
LEWIS  
*v.*  
DAVISON.

**PARKE, B.**—The rule is irregular. We have referred to the officer of the Court, and he says that the rule ought to have been drawn up on reading the original writ; and therefore we think the rule ought to be enlarged, for the purpose of amending the original rule and re-serving it, the defendant paying the costs of the opposite party's appearing here by counsel. Upon the amended rule afterwards coming on to be heard on the last day in this term,

**Mansel** objected.—*First*, that the indorsement on the writ of *capias* was not in the form prescribed by the 2 Will. 4, c. 39, s. 12. It appeared that the plaintiff had sued out the *capias* in person, and that the indorsement on the writ was—" This writ was issued by *Charles Lewis*, of No. 6, *Berners Street, Brunswick Square*, the plaintiff within-named, in person;" and he objected that the form given by the act had not been followed, the words of the form in Sched. No. 4. being—" This writ was issued in person by the plaintiff within-named, who resides at ——— [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be]. " He contended, that this objection had been frequently held to be fatal, and cited *Price's Exch. Pract.* 111. [Parke, B.—The question is, whether this is not in substance the same as the words " of such plaintiffs' residence :" the words in the *capias* must pursue the act, but it is not necessary that the indorsement should do so. Then is not this the same in substance ?] In *Smith v. Crump* (a), Mr. Justice Parke says—" The statute provides the form in which the summons is to be drawn; and if the parties

(a) 1 Dowl. Pr. Ca. 519.

will not take the trouble of looking at the act before they proceed, they must take the consequences." [Alderson, B.—This is only an irregularity, and does not make the writ void. Lord Lyndhurst, C. B.—The writ is not void. If it was irregular, you should have applied to a judge, by which means you might have obtained leave to go to the sheriff's office, and to have looked at the writ, and got a copy of it.] The defendant could not obtain a copy at the sheriff's office of an unexecuted writ. [Lord Lyndhurst, C. B.—Suppose a man had a house and an office: the house would be his residence, but his office would not be so; and yet it would be correct to say "of" the place where his office was.]

*Recd. of Pleas,  
1834.*

LEWIS  
v.  
DAVISON.

Humphrey, contra.—In the case of *Osborn v. Gough* (a), it was held that a notice of action to a magistrate under 24 Geo. 2, c. 44, s. 1, indorsed with the name of the plaintiff's attorney, and the words "of Birmingham," as describing his place of abode, was sufficient. The same construction was also adopted in *Cooke v. Currey* (b). At all events, it was a mere irregularity, and the writ having been issued several months before, it is clearly now too late to take the objection.

Mansel.—The defendant swears, that he did not know of the outlawry until about six weeks ago. At that time the writ was filed, and this motion was made early in this term, which, it is submitted, was in time, as no application could be made to a judge at chambers to set it aside. [Parke, B.—We are informed by the officer of the Court, that the writ might have been seen with the filacer on the 4th of June. Lord Lyndhurst, C. B.—I think the application was made too late to set aside this writ, as the defendant might have had an inspection of it on the 4th of June. Alderson, B.—An application should have

(a) 3 Bos. & Pull. 551.

(b) Tidd's Pract. 9th ed. p. 30

*Exch. of Pleas,*  
1834.

Lewis  
G.  
Davison.

been made to a judge at chambers.] Another objection is, that the writ was returned *non est inventus*, before four months had elapsed from the *teste* of the writ, which was the 17th of April. If the plaintiff had wished to have an earlier return, his proper course was to apply to the Court, or a judge at chambers, to authorize a more speedy return. The practice is to go before a judge with an affidavit that the party cannot be found, and the judge thereupon gives permission to return *non est inventus*. [Lord Lyndhurst, C. B.—Taking that to be necessary, yet it was not necessary to refer to the judge's order in the writ; and we must assume that the proceeding was regular.] Another objection is, that the *exigent* is not tested on the return of the *capias*, and the 12th rule of Hilary Term, 2 Will. 4., directs that the officer with whom it is filed shall indorse the day and hour when it was filed. In this case, the sheriff made his return on the 17th, but it was not filed until the 18th; and therefore the return was not complete until the 18th. The Uniformity of Process Act, s. 5, requires that every writ shall bear date of the day it issues. The writ of *exigent* is dated the 17th, and therefore it was issued too soon. [Lord Lyndhurst, C. B.—The *exigent* is not issued on the authority of the Uniformity of Process Act. It may, therefore, have issued on the 18th, tested on the 17th. Parke, B.—The *exigent* is not a writ within the meaning of the 12th section of that act.] Then the proclamations are not right. The act of the 31 Eliz. c. 3, s. 1, requires that one of the proclamations shall be made at or near the most usual door of the church or chapel of the town or parish where the defendant was living at the time of the *exigent* awarded. The writ, therefore, ought to have followed the act, and directed the proclamation to be made at the nearest chapel or church. It, however, merely directs proclamation to be made at the parish church, it not appearing whether that is the nearest church or chapel.

**Lord LYNDHURST, C. B.**—In order to raise that objection, you ought to have had an affidavit, shewing, that there was a nearer church or chapel; the act does not require the writ to be in any precise form. The sheriff may have known that there was no nearer church or chapel, and it is not shewn that there was any. Without that being shewn, I think it must be assumed, that the proclamations were directed to be made according to the act.

*Exch. of Pleas,  
1834.*

LEWIS  
G.  
DAVISON.

**PARKE, B.**—The question is, whether it ought to have been mentioned in the writ; but the act does not appear to require that it should be so. I think, under the circumstances, that the defendant should have a week's time to put in bail; and that, upon payment of costs, the rule as to setting aside the proceedings should be made absolute.

Rule accordingly.

END OF MICHAELMAS TERM.

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Courts of Exchequer

AND

## Exchequer Chamber.

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EXCHEQUER OF PLEAS, HILARY TERM, 5 WILL. IV.

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### MEMORANDA.

1835.

DURING the vacation after last *Trinity* Term, the Rt. Hon. Sir *John Leach*, Knt., Master of the Rolls, died at *Edinburgh*. He was succeeded by Sir *Charles Christopher Pepys*, Knt., his Majesty's Solicitor General. Early in *Michaelmas* Term following, *Robert Mounsey Rolfe*, Esq., one of his Majesty's Counsel, was appointed Solicitor General.

On the 21st of *November*, in the same term, the Rt. Hon. *Henry Lord Brougham and Vaux*, Lord Chancellor, resigned the Great Seal, which his Majesty was graciously pleased to deliver to the Rt. Hon. *John Singleton, Lord Lyndhurst*, Lord Chief Baron of the Court of *Exchequer*, and who was sworn into the office of Lord Chancellor, on the 22nd of *November*, in the same term. He, however, continued to preside as Chief Baron during the remainder of the term. On his resignation in the vacation subse-

quent, Sir *James Scarlett*, Knt., was appointed to succeed him in the office of Lord Chief Baron, and was shortly afterwards raised to the dignity of the peerage, by the title of Baron *Abinger* of *Abinger*, in the county of *Surrey*.

1835.

Sir *John Campbell*, Knt., in the same vacation, resigned the office of his Majesty's Attorney General, and was succeeded by *Frederick Pollock*, of the *Inner Temple*, Esq., one of his Majesty's Counsel, who was afterwards knighted.

*Robert Mounsey Rolfe*, Esq., at the same time, resigned the office of his Majesty's Solicitor General, and was succeeded by *William Webb Follett*, of the *Inner Temple*, Esq., who was thereupon knighted.

During the same vacation, *Daniel Wakefield*, *Henry John Shepherd*, *William Skirrow*, *Christopher Temple*, *C. H. Barber*, *John Miller*, *Richard Kindersley*, *Edward Jacob*, *James Wigram*, and *Fitzroy Kelly*, of *Lincoln's Inn*, Esquires; and *William Burge*, *George Spence*, and *Thomas John Platt*, of the *Inner Temple*, Esquires, were appointed his Majesty's Counsel.

On the first day of this term died the Hon. Sir *William Elias Taunton*, Knt., one of the Judges of the Court of *King's Bench*. He was succeeded by *John Taylor Coleridge*, Esq., Serjeant-at-Law, who was afterwards knighted.

*Exch. of Pleas,*  
1835.

### DANIELL v. PHILIPPS and DAVIES.

In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction under 7 & 8 Geo. 4, c. 30, s. 24, of the plaintiff, for "unlawfully and maliciously damaging," &c., a

quantity of rushes, for which they adjudged the plaintiff to pay the sum of 10s. as a reasonable compensation, and 6s. 6d. for costs; and, in default of immediate payment, the plaintiff to be imprisoned for one calendar month, unless the said sums should be sooner paid. The warrant of commitment stated the offence to be, that the plaintiff unlawfully trespassed on land in the occupation of *D. Thomas*, and cut down and carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. penalty, and the gaoler was ordered to detain him for the space of one month, or until he should be delivered by the due order of law:—*Held*, that the conviction sufficiently supported the commitment.

(a) Which enacts, "That if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be

applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being

The defendants relied upon the conviction as a defence. *David Thomas*, the party aggrieved, was examined in proof of the offence. The conviction was in the following form:—

"Be it remembered, that on the 19th day of *January*, in the year of our Lord 1833, at *Carmarthen*, in the said county, *Daniel Daniell* is convicted before us, *John Geo. Philipps* and *David Davies*, Esquires, two of His Majesty's justices of the peace for the said county of *Carmarthen*, for that he, the said *Daniel Daniel*, on the 31st day of *December*, in the year of our Lord 1832, at the parish of *St. Ismael*, in the county of *Carmarthen* aforesaid, a certain quantity of rushes, to wit, three cart loads of rushes of *David Thomas* then and there being, *unlawfully* and *maliciously* did damage and injure, cut and carry, against the form of the statute in that case made and provided. We, the said *John George Philipps* and *David Davies*, the justices of the peace aforesaid, do therefore adjudge the said *Daniel Daniel* for his said offence to forfeit and pay the sum of 10*s.* as a reasonable compensation for the damage and injury so committed by the said *Daniel Daniel* as aforesaid, and also to pay the sum of 6*s. 6d.* for costs; and in default of immediate payment of the said sums, to be imprisoned in the house of correction of the said county, and there kept to hard labour for the space of one calendar month, unless the said sums shall be sooner paid. And we, the said justices, do direct, that the said sum of 10*s.* shall be paid to *William Andrews*, of the said parish of *St. Ismael*, being one of the overseers of the poor of the said parish in which the said offence was committed, to be applied by him according to the directions of the statute in that case made and provided, (*David Thomas*, the owner of the said rushes, having been examined in proof of the

wilful and malicious, committed in hunting, fishing, or in the pursuit of game; but that every such

trespass shall be punishable in the same manner as before the passing of this act."

*Exch. of Pleas,*  
1835.

DANIELL  
v.  
PHILIPPS.

*Exch. of Pleas, offence aforesaid).* And we order that the said sum of  
 1835. 6s. 6d. for costs shall be paid to the said *David Thomas*.  
 DANIELL Given," &c.  
 v.  
 PHILIPS.

The warrant of commitment was in the following form:—

"These are to command you, the said constables, and each of you, in his Majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said house of correction, the body of *Daniel Daniel*, of the parish of *St. Ismael*, in the said county, charged before us with having, on the 31st day of *December* now last past, *unlawfully trespassed* upon lands the property of the Rev. *Edward Picton*, clerk, in the occupation of *David Thomas*, at *Rotten Hill*, in the said parish of *St. Ismael*, and with having cut down and carried away a quantity of rushes, of which offence the said *Daniel Daniel* is convicted before us, and ordered to pay the sum of 10s. *penalty*, and also the sum of 6s. 6d. costs attending the prosecution of the said complaint, which the said *Daniel Daniel* doth refuse to pay; and you, the said keeper, are hereby required to receive the said *Daniel Daniel* into your custody in the said house of correction, and him there safely keep for the space of one calendar month, or until he thence be delivered by the due order of law. Given," &c.

Under this commitment the plaintiff was conveyed to prison on the 19th *January*, 1833, and remained there until the 21st of the same month, when he was discharged upon the payment of the 10s. and costs. In answer to the defence upon the conviction, the variance between the conviction and the commitment was insisted upon; but the learned Judge thought that variance cured by the 39th section of the 7 & 8 *Geo. 4*, c. 30 (a); and, the plaintiff re-

(a) Which enacts, "That no warrant of commitment shall be held void by reason of any defect therein, provided it be therein al-

leged that the party has been convicted, and there be a good and valid conviction to sustain the same."

fusing to be nonsuited, directed the jury to find a verdict for the defendants, which they did accordingly. In *Easter Term* last, *E. V. Williams* obtained a rule to shew cause why the verdict for the defendants should not be set aside and a new trial had.

*Recd. of Pleas,*  
1835.

DANIELL  
S.  
PHILIPS.

*Chilton* and *J. Evans* now shewed cause.—The position contended for on behalf of the plaintiff is this, that though the conviction be good, the warrant of commitment is bad, and is not supported by the conviction. The principal objection taken was that the conviction described a different offence to that which was untechnically described in the commitment. But the latter in substance describes the offence for which the plaintiff was convicted; and, even if that were not the case, the variance is cured by the 39th section of the 7 & 8 Geo. 4, c. 30, which was expressly designed to meet a case like the present, and to protect magistrates from the consequences of errors merely technical. The commitment here comes within all the terms of that section; for it is alleged that the party has been convicted, and there is a good and valid conviction to sustain the commitment. If it were still necessary that the commitment should strictly pursue the conviction, that clause would be useless, for then there would be no such defects as it mentions to be cured. [Lord Lyndhurst, C. B.—Whether the offence mentioned in the conviction and the offence mentioned in the commitment were the same, was a question of fact.] That question was never left to the jury. If there had been in fact any question as to the offences being distinct, the plaintiff should have had it put to the jury, and should have shewn, by evidence, that they were distinct; but in the absence of any such proof, when a commitment is produced referring to a prior conviction for a similar offence, *viz.* a trespass committed by the same person, and imposing the same sum, *viz.* 10*s.* to be paid by the offender, it must be presumed that the commitment

*Exch. of Pleas,*  
1835.

DANIELL  
v.  
PHILIPPA.

proceeded on the conviction, and that the offence is one and the same. It is then objected to the commitment that it states the offender to have been ordered to pay the sum of 10*s.* *penalty*, whereas the conviction awarded the sum of 10*s.* as a *reasonable compensation*, pursuant to the terms of the statute. The mere calling of this sum *a penalty* will not alter the nature of the payment; nor can it be doubted that the sum called a penalty refers to the sum described in the conviction as a reasonable compensation. The payment was in fact more in the nature of a penalty than of a compensation in this case, for it was given to the poor of the parish. The last objection is, that the conviction and commitment vary with regard to the statement of the judgment: the former being that the offender, in default of payment, shall be imprisoned in the house of correction for one calendar month, unless the said sums shall be sooner paid; and the latter directing the gaoler to keep him in custody "for the space of one calendar month, or until he shall be discharged by the due order of law." In fact, the offender was discharged, according to the provisions of the statute, within two days after his committal, and the words of the commitment are in substance also according to these provisions. Suppose the commitment had only stated the conviction without mentioning any time, but had simply directed the gaoler to keep the offender in custody until discharged by due course of law; such a commitment would not have been any variance from the conviction. How then does the addition of the one month alter it? The act itself directs that in a certain case he may be detained for the space of one month; and the commitment says no more; for it does not direct him to be imprisoned for one month, at all events, but "for one calendar month, or until he be thence delivered by the due order of law." Now, the due order of law is, that he shall be delivered before the expiration of the month, upon payment of the money; and that condition, therefore, is impliedly con-

tained in the commitment. But, here again, granting it to be a variance, it cannot be taken advantage of since the 7 & 8 Geo. 4, c. 30, s. 39.

*Exch. of Pleas,  
1835.*

DANIELL  
*v.*  
PHILIPPS.

*E. V. Williams, and James, contrā.*—The question before the Court is one of great importance; for the clause upon which the defendants rely, as curing the defect in the commitment, occurs not only in the 7 & 8 Geo. 4, c. 30, but in the 9 Geo. 4, c. 31 (Lord *Lansdowne's* Act), and in the 9 Geo. 4, c. 69 (the Game Act); and it is very material that the operation of that clause should be accurately understood. It will be convenient, in the first place, to consider the defects in the commitment; and then to examine the question, whether those defects are cured by the 39th section of the 7 & 8 Geo. 4. There is no such offence known in the criminal law as that described in the commitment. No statute gives to magistrates the power of convicting a man for “unlawfully trespassing” upon lands, the property of another. The statute upon which the conviction proceeded only gives the justices jurisdiction where a person “*wilfully or maliciously* commits any damage, injury, or spoil to or upon any real or personal property.” The commitment states, that the plaintiff unlawfully trespassed on land in the possession of *David Thomas*, and cut down and carried away a quantity of rushes. This is a description merely of a civil trespass to real property; the cutting and carrying away of the rushes being an aggravation of the trespass committed to the realty. But the offence described in the conviction is totally different. Not only does it differ in the nature of the offence, but in the nature of the property to which the injury has been done. It is laid as a *malicious* damage, and the property damaged is described as personal property only, *viz.* three cart-loads of rushes, without any reference whatever to an injury to real property. Now, the statute, having mentioned both real and personal property, must be understood as drawing a dis-

*Eccles. of Pleas.*  
1835.  
 DANIELLE  
 PHILIPPE.

tinction between the two, and as requiring it to be set forth to which kind of property in particular the damage has been done. Two distinct classes of offences are pointed at by the statute, and the offence described in the conviction belongs to one of those classes, and the offence in the commitment to the other. It is clear, that, unless prevented by the operation of the 7 & 8 Geo. 4, c. 30, s. 39, such a variance would be fatal. *Rogers v. Jones* (*a*). It is there said by the Court: "The commitment and the conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and a different offence." The variance between the two instruments in that instance was less material than in the present case. [Gurney, B.—There the conviction proceeded upon one statute, and the commitment upon another.] In *Wickes v. Clutterbuck* (*b*), it is said by Park, J.:—"Here the magistrate is to get rid of a bad commitment by referring to a previous conviction. In this, perhaps, he might have succeeded, if he had shewn that the commitment pursued the conviction, and that the conviction was good; which, for the present purpose, I will assume to have been the case. But the commitment is on a ground totally different from that charged in the conviction; and how am I to know that there were not two informations against the party? Besides, the commitment does not state any ingredient of the offence described in the act, nor any offence within the summary jurisdiction of the magistrate; and it is not enough for us merely to believe that it refers to the conviction, in a matter which ought to be considered so strictly." How did it appear in the present case, that the conviction and commitment were not in reality for two different offences? [Lord Lyndhurst, C. B.—That was a question of fact for the jury, and ought to have been put to them if it

was intended to be insisted upon. But it never was pretended that there was more than one conviction.—The commitment refers to a conviction, and it must be presumed that it was to the one in question. *Alderson*, B.—The objection would apply to every case of a variance.] The next objection is, that the commitment is for a *penalty*, while the conviction is for a *reasonable compensation*. The intention of the statute was, that in these cases the magistrates should exercise a discretion as to what shall be paid by the offender, not as a penalty, or punishment of the offender for the act done, but as a reasonable compensation to the party aggrieved by the consequences of that act. In the imposing of a penalty, no such discretion is required, and the two payments are therefore quite distinct in their nature; and the conviction and commitment contain different judgments, imposing different payments. [Lord *Lyndhurst*, C. B.—The form of conviction given by the statute (*a*) uses the word “penalty:” “*[or, I adjudge the said A. O. for his said offence, to forfeit and pay (here state the penalty actually imposed, or state the penalty, and also the amount of the injury done, as the case may be.)]*”] In order to make the commitment good, it must appear on the face of it, that the magistrates have exercised their discretion. [*Parke*, B.—It must be presumed that they have done so.] The last objection is, that the commitment is for a month certain, while the conviction is only, according to the statute, conditional for a month, unless, in the meantime, the money be paid. Under the commitment, the gaoler would not be justified in releasing the offender, in any event, until the expiration of the month; and though, in fact, he did release him before that time, it was at his own peril. The only strictly legal extrication from such a commitment would have been a *habeas corpus*. These are the va-

*Eccles. of Pleas,*  
1835.

DANIELL  
v.  
PHILIPPS.

*Esch. of Pleas,* variances between the two instruments, and they are fully sufficient to prevent their connexion, and to render the imprisonment illegal. The commitment is in the nature of process of execution, and if an execution does not pursue the judgment, it furnishes no justification. But it is said, that even if these are to be regarded as material variances, the magistrates are protected by the 39th section of the 7 & 8 Geo. 4, c. 30. It was not the object of that clause to afford any such protection. It could not be the intention of the legislature to enable magistrates, who had once been guilty of an unlawful act, in imprisoning a man under a warrant clearly illegal, to avoid the consequence of that act by afterwards drawing up a legal conviction for *some* offence, no matter how different from that in respect of which the party was committed, and thus deprive him of all civil remedy for the grievance. Suppose a man thus illegally condemned to hard labour, is it to be contended, that the justices, by putting a false conviction on the files of the quarter-sessions, shall prevent his recovering any compensation? [Lord Lyndhurst, C. B.—It must be taken, that the conviction was previously filed. In contemplation of law, it is necessarily previous to the commitment.] The words of the 39th section are certainly very sweeping and extensive; the commitment is not to be void by reason of *any* defect therein, but then it is, *provided there be a good and valid conviction to sustain the same.* It is not therefore sufficient merely that there should be a good and valid conviction for *some* offence against the same offender, but it is necessary that the conviction *should sustain the commitment;* and how can it be said, that in this case the commitment is sustained by the conviction, when the two instruments differ in the nature of the offence, the nature of the penalty imposed, and the consequences of not paying the penalty; thus, in fact, agreeing in no other particular, than in being directed against one and the

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same individual? The clause could never have been intended by the legislature to apply to such a case, but merely to cure technical mistakes, and errors not material to the substance of the instrument.

*Cur. adv. vult.*

*Exch. of Pleas,  
1836.*

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The judgment of the Court was now delivered by

**PARKE, B.**—This was an action of trespass and false imprisonment against the defendants, two justices of the peace for the county of *Carmarthen*. There was a plea of the general issue. On the trial before my Brother *Gurney* at the last Spring assizes, a verdict was found for the defendants by the direction of the learned Judge, the plaintiff not choosing to be nonsuited. A rule *nisi* having been obtained to set aside this verdict, cause was shewn, and the case fully argued before my Lord *Lyndhurst*, and my Brothers *Alderson*, *Gurney*, and myself, in the last term. The facts of the case were these:—The plaintiff was convicted before the defendants on the 19th of *January*, 1833, under the 7 & 8 Geo. 4, c. 30, s. 24, and ordered to pay the sum of 10s. and costs; and on the refusal by him to do so, he was committed to prison by a warrant of commitment, directed to the constables of the parish of *St. Ishmael*, and the keeper of the house of correction, under the hands and seals of the two defendants, the material part of which is as follows:—[His Lordship here read the warrant of commitment.] A conviction was produced on the trial, of which the following is a copy:—[The learned Judge read the conviction.] Several objections were taken to this commitment:—*First*, that no offence was stated in the recital of the conviction, because, in order to constitute an offence (within the 24th sect. of 7 & 8 Geo. 4, c. 30), the damage must be *wilfully or maliciously* committed, and there is no statement that the trespass, though unlawful, was wilful or malicious. *Secondly*, it was ob-

*Exch. of Pleas,* jected that the conviction did not support the commitment, for the former was for an injury to personal, the latter to real property. The *third* objection was, that the commitment was for the non-payment of a *penalty*, while the adjudication of imprisonment in the conviction was for the non-payment of a sum of money *by way of compensation* for the damage; and the *fourth* and last, that the commitment was void, because it was for a month, or until he be delivered by the due order of the law; and the act authorised a commitment for any term not exceeding two calendar months, not absolutely, but unless the sum ordered to be paid, and costs, should be sooner paid. In answer to these objections, the defendants' counsel relied on the 39th sect. of the same statute, 7 & 8 Geo. 4, c. 30; by which it is enacted, *inter alia*, that "no such conviction shall be quashed for want of form, or be removed by *certiorari*, &c., and no warrant of commitment shall be held void, by reason of *any defect* therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction *to sustain the same.*"

The first of the objections is certainly cured by this clause in the statute, and the second ought not to prevail, because it charges, that the conviction is for the same offence, though in somewhat different language; *viz.* for the maliciously cutting and carrying away a quantity of rushes; and it proceeds upon the same statute as that on which the commitment is founded; in which respect this case is distinguishable from that of *Rogers v. Jones* (a), cited at the bar, where the commitment and conviction were for offences against different statutes. As little foundation is there for the third objection; *viz.* that the commitment is for non-payment of a penalty. The 24th section treats as a penalty the sum awarded by the jus-

(a) 3 B. & C. 409; 5 D. & R. 268, S. C.

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tices, where the party aggrieved is examined in proof of the offence (and that was so in the present case,) for it directs the money to be applied as every *penalty* imposed by a justice of the peace under that act is thereafter directed to be applied. The objections are therefore reduced to the fourth and last, which is, that the commitment is for a month absolutely, whereas the statute authorises a commitment for that time, unless the sum ordered to be paid, and costs, be sooner paid. It is clearly settled, that the cause of commitment ought to be certainly stated, to the end that the party may know for what he suffers, and how he may regain his liberty (*a*). And if it be not, it is not only a ground for discharging the party, but the warrant is void, and no justification in an action of false imprisonment. *Groome v. Forrester* (*b*), contrary to the *dictum* of Lord *Holt* in *Bracey's case* (*c*). In the present case, the conclusion of the warrant of commitment is clearly wrong, unless the words, "unless he be released by the due order of the law," are equivalent to the qualification which the statute requires, and which ought to have been introduced, *vis.* "unless the money should be sooner paid." But that they are not equivalent appears by Dr. *Groenveld's case*, and by the *Mayor and Churchwardens of Northampton's case* (*d*), and *Yoxley's case* (*e*). The case of *Goff* (*f*) is no authority to the contrary; for there was no uncertainty on the face of the commitment; the adjudication was recited, and was correct; and the Court construed the conclusion of the warrant with reference to the recital in the warrant itself. There is no doubt, therefore, in our minds, but that the conclusion of this warrant of committal is wrong,

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|------------------------------------------------------------------|--------------------------------------------------------------|
| ( <i>a</i> ) <i>Dr. Groenveld's case</i> , 1 Ld.<br>Raym. 213.   | ( <i>d</i> ) <i>Carth.</i> 152.<br>( <i>c</i> ) 3 Salk. 351. |
| ( <i>b</i> ) 5 M. & Selw. 314.<br>( <i>c</i> ) <i>Comb.</i> 391. | ( <i>f</i> ) 3 M. & Selw. 203.                               |

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*Exch. of Pleas,* and the commitment void, unless it be aided by the 39th section, above referred to. It is contended by the plaintiff that it is not, because that section has no operation unless two conditions are complied with: *first*, that it is alleged in the warrant that the party is convicted; and, *secondly*, that there be a good and valid conviction to sustain the warrant of commitment; and although it is admitted that the first condition is performed, it is insisted that the second is not. And the case appears to us to resolve itself into the question, whether the conviction in this case, which is certainly good and valid on the face it, does sustain the warrant of commitment within the meaning of the act. On the part of the plaintiff it is contended, that it does not, because it is insisted that it is necessary that the conviction, in order to sustain the commitment, should authorise that imprisonment which it directs; and this conviction does not. Though it may not be necessary that they should agree in every particular, it is contended that an agreement in this respect is essential; otherwise a commitment might be for 10 years, and a conviction adjudging an imprisonment for a month might render the commitment valid for a month. On the other hand, it was argued for the defendants, that all which this clause in the statute requires is, that there should really be a conviction on the face of it good and valid, and that the warrant should be issued on that conviction. We have felt considerable doubt, in the course of the argument and on subsequent consideration, upon this question; but we have come to the conclusion, that the effect of the 39th section is to render this warrant valid. It is perfectly clear that the legislature meant to cure some defects in the warrant by this clause; it is equally clear that, in order to ascertain whether any defects in the warrant are cured, reference must be had to the conviction itself, for the purpose of ascertaining that it is good and valid. Hence it

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follows, that neither the party to be affected by the warrant, nor those who are to act upon it, can know from the warrant alone (if there be *any* defect on the face of it), whether it is valid or not. There *must* be a reference had to the conviction; and in this respect, the clause in question alters the general law, by which the offence and punishment are to be collected from the warrant itself. We cannot help thinking, that the reason why the legislature has made it essential to the cure of any defect in the commitment, that it should state that the party was convicted, is to give those who are to act upon, or be affected by the warrant, notice that there is a conviction, and put them upon inquiring after the terms of it. If there is to be a reference to the conviction (as there must be), why are we to narrow the beneficial effect of the clause in question, by holding that the reference must be for one purpose, and not for all? Our opinion is, that as both instruments must be looked at by all parties concerned in the validity of the warrant, whenever there is *any* defect in it, *both* are to be read together, and to be held explanatory one of the other; and if, thus reading them, the conviction justifies the commitment so explained, it is sufficient. Taking the two together in this case, the conviction explains the ambiguous words at the end of the commitment; and they may, on the principle of the decision in *Goff's case*, above referred to, be construed, by aid of the conviction, to mean that the plaintiff is to be imprisoned for a month, unless the money be in the mean time paid. It is unnecessary for us to decide whether the imprisonment would have been justified, if the conclusion of the warrant had not contained ambiguous words, capable of explanation by the context, and had been plainly wrong; as, if the commitment had been for two months, and the adjudication for one, unless the money should have been first paid: though, looking at the very large words of the 39th section, even such a defect may

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have been intended to be cured. We, therefore, think that the 39th section does cure the defect in this case, as the warrant does refer to a conviction, and there is a good and valid conviction on which the warrant was founded, and which does, when both are read together, *sustain* the warrant, even in the sense attributed to that word by the plaintiff's counsel; that is, it authorises the imprisonment mentioned in the warrant. We feel satisfied, that by giving this construction to this clause, we are acting in accordance with the intention of the legislature, which clearly was to protect magistrates from the consequences of inaccurate commitments, drawn up on the spur of the occasion by unlearned men. The rule must therefore be discharged.

Rule discharged.

#### WILLIAMS v. ROBERTS.

A summons to refer an attorney's bill for taxation, and a Judge's order thereupon, do not operate as a stay of proceedings, so as to prevent the attorney from suing upon the bill.

A writ issued under sect. 10 of 2 & 3 W. 4, c. 39, to prevent the operation of the Statute of Limitations, may be returned *non est inventus* without any attempt at service.

*J. JERVIS* had obtained a rule to shew cause why the writ, and proceedings thereupon in this cause, should not be set aside for irregularity. The action was brought upon an attorney's bill, delivered the 28th *February*, 1834. On the 2nd of *March*, a summons to tax the bill was taken out, attendable on the 29th, and on that day the plaintiff issued his writ. The summons was regularly attended, and an order was made, referring the bill to the Master for taxation. The writ having been returned *non est inventus*, within one calendar month after its expiration, a second writ was issued. The rule was obtained by *Jervis* on two grounds:—*first*, that the first writ was irregular, in having issued while there was a stay of proceedings; and *secondly*, that the *first writ* ought to have been served before the issuing of the second. It appeared from the affidavits, that the defendant might have been served with the writ had any attempt to that effect been made.

*R. V. Richards* now shewed cause.—The summons and order did not operate as a stay of proceedings. When the summons issued, no proceedings had been commenced, and it could not therefore operate as a stay. The summons was a collateral proceeding, and not in the cause. With regard to the second objection, the Uniformity of Process Act does not require that the first writ should be served. The words of the proviso in the act are (a):—“That no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ, if any, issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; such return to be made in bailable process by the sheriff, or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff, or his attorney, suing out the same, as the case may be.” Before this statute, the plaintiff would have been at liberty to issue his writ, and, without serving it, to keep it alive by entering continuances at any subsequent period; and, unless there is something in the above clause which renders it imperative upon him to serve the writ, the Court will not drive him on to prosecute an action from which he may derive no fruit. The act specifies certain conditions, without a compliance with which a writ shall

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and these conditions are in the alternative, *viz.*—*first*, “unless the defendant shall be arrested thereon, or served therewith;” or, *secondly*, “unless proceedings to or towards outlawry shall be had thereupon;” or, *thirdly*, “unless such writ, and every writ, if any, issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record,” &c. The plaintiff has adopted and complied with the last condition, which does not require that any attempt should be made to serve the writ before the return of *non est inventus*: and having caused it to be entered of record, he has satisfied the statute, the object of which was, that, by the writ being entered of record, the defendant might, by searching, have an opportunity of ascertaining whether or not the plaintiff had kept alive his remedy.

*J. Jervis*, in support of the rule.—It may be assumed that the writ issued after the 29th, when the summons was returnable; and whether or not the summons acted as a stay of proceedings, the order, at all events, would have that effect. [Lord *Abinger*, C. B.—An order made upon a summons to refer an attorney’s bill for taxation is no stay of proceedings. Under special circumstances such stay might be directed; but it is not so here.] The case of *Wells v. Secret* (a) is an authority to shew that the order operates as a stay. [Parke, B.—It is so with regard to a summons in a cause, but not with respect to a summons like the present, in a collateral proceeding.] At all events, upon the second point the defendant ought to have this rule made absolute. Since the passing of the Uniformity of Process Act, a party is not entitled to issue a writ, without proceeding upon it. The evil before that statute was, that a person might issue a writ, and, fifty years afterwards, by entering continuances, might defeat

(a) 2 Dowl. P. C. 447.

the operation of the Statute of Limitations. To remedy that evil was the object of the new statute, which requires a writ to be issued every four months, and not only so, but requires also such writs to be served. Unless served, the defendant could have no notice of them, and might ultimately be loaded with all the arrears of costs occasioned by these proceedings. [Parke, B.—That by no means follows. The Master informs us that such costs would not be allowed.] Great inconvenience and injustice would follow from holding that the writ need not be served. A person having a cross demand, might forbear from enforcing it, relying on the Statute of Limitations, and, after he had lost his own remedy, might find that by a secret writ his debtor could enforce his own claim while he had lost his set-off. The proviso should be read as if after the words *non est inventus* there were added the words, "if he cannot be arrested or served therewith," as in the preceding clause.

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Lord ABINGER, C. B.—The first ground upon which this rule was moved, has been very properly abandoned, and I am of opinion, with regard to the other point, that the rule must be discharged. The proviso in the 10th section of the Uniformity of Process Act is quite distinct from the previous enactment, and relates solely to writs issued for the purpose of avoiding the Statute of Limitations. It mentions three modes by which that object may be effected, and the last of these modes is, by issuing a writ, and procuring it to be returned *non est inventus* and entered of record. But nothing is said in that clause respecting the necessity of having such writ served. The meaning of the statute is, that the plaintiff, at the expiration of each four months, shall do that which, before the statute, he was at any subsequent time at liberty to say that he had done. The object was to compel him to proceed regularly, and to abolish the fiction of writs having issued,

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which never, in fact, had any existence (*a*). It may also have been intended, as Mr. *Richards* has suggested, that, by the writ being entered of record, the defendant might have an opportunity of knowing what steps were taken against him.

**PARKE, B.**—I am entirely of the same opinion. Mr. *Jervis* would introduce into the proviso in question words which would materially alter its construction. Now, it is a well established rule in the construction of acts of Parliament, not to introduce any new words, unless, without such introduction, something manifestly absurd or repugnant would follow. But that is not the case here; and the statute may be read as it stands, without the necessity of any such additional words. The object to be accomplished was, the making it necessary for the plaintiff actually to do that which, according to the old practice, it was sufficient for him to state upon the record that he had done. This is effected by the proviso, which, being capable of receiving a sensible construction, must be understood in the ordinary sense of the words, as they stand. It is unnecessary to give an opinion whether or not it might have been better to require that in such cases the writ should actually be served.

Rule discharged, with costs.

(*a*) But the statute does not abolish the old practice of entering continuances, except in the case of writs issued under this section for the purpose of avoiding the operation of the Statute of Limitations. In other cases

the plaintiff may issue his writ, and more than four months after the expiration of that writ may enter continuances and proceed. *Nicholson v. Rowe*, 2 Crem. & M. 469; Dowl. P. C. 296, S. C.

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## ADAMS v. G. BANKART and G. T. BANKART.

**A**SSUMPSIT on an award. The declaration stated, that certain differences had arisen between the plaintiff and certain other persons, theretofore his partners, to wit, one *John Pares* and one *James Heygate*, since deceased, and the defendants; and that for putting an end to the same, the plaintiff and the said *J. P.* and *J. H.* and the defendants submitted themselves to the award of one *Samuel Miles*; and it then stated the award, &c. Plea, the general issue. At the trial before *Taunton J.*, at the last *Summer Assizes* for the county of *Leicester*, it appeared, on the evidence of *Miles*, the arbitrator, that the submission was by parol; that the arbitrator had been requested by *Pares* only to undertake the reference, in the course of which, however, he saw *Heygate*, but that the defendants had never attended the reference. The plaintiff *Adams* attended the reference in person. *Miles* stated that the defendants were represented at the reference by their attorney, *Frederick Bankart*. It was objected on behalf of the defendants, that the submission of all parties to the award had not been proved; that there was no assent on the part of the plaintiff or of *Heygate* to the reference; and that one partner had no power to bind another partner to submit to arbitration. The fact of the arbitrator having seen *Heygate* during the reference being called in question at the trial by the counsel for the defendants, the notes of the learned Judge were appealed to, and it did not appear from them that the arbitrator had seen *Heygate*; whereupon the counsel for the plaintiff proposed to recall *Miles*, for the purpose of ascertaining the exact evidence he had given on this point; but the learned Judge said, that he could not allow a witness, after it had been seen where the shoe pinched, to be re-examined; and he inquired from the counsel for the

One partner has no implied authority to bind his co-partner to a submission to arbitration, respecting the matters of the partnership.  
It is in the discretion of the Judge whether he will permit a witness to be recalled.

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defendants whether he objected to the witness being recalled; and on his stating that he did so object, he refused to recall him. The learned Judge told the jury that the fact of the plaintiff having attended the reference, was sufficient evidence of a submission on his part; and that *Frederick Bankart* having acted as the attorney of the defendants, they must be taken to be bound by his acts. But, in consequence of the submission of *Heygate* not being proved, the plaintiff was nonsuited. In *Michaelmas Term*, *Hill* having obtained a rule to shew cause why the non-suit should not be set aside and a new trial had—*first*, on the ground of the refusal of the learned Judge to recall the witness *Miles*; and *secondly*, on the ground that *Pares* was entitled to bind his co-partner by submitting to the reference—

*Goulburn*, Serjt., and *Mellor*, now shewed cause.—With regard to the first point, it is clear that it was in the discretion of the learned Judge whether he would recall the witness; he exercised that discretion, and the Court will not now question it. [Parke, B.—When the rule was moved for, it was understood that Mr. Justice *Tawton* had stated that he had no power to recall the witness without the consent of the defendants; but as this does not appear upon the report, it must be taken that he did exercise his own discretion. Lord *Abinger*, C. B.—The learned Judge says, “the objection being made, I refused to recall the witness;” the meaning of which is, that, in the exercise of his discretion, he refused, on the objection being made, to permit the witness to be recalled. It is quite clear that it is merely matter of discretion.] Then, upon the second point, *Stead v. Salt* (a) is an express authority to shew that one of several partners cannot bind the others by a submission to arbitration, although relating

(a) 3 Bingh. 101.

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to partnership matters. That case was decided on the ground that the entering into a submission to arbitration is no part of the ordinary business of a trading firm, and that an authority from one partner to another can only be implied for what is necessary to carry on the trade in which the partners are concerned. The case of *Ferrer v. Oven* (a) shews that it is necessary that the submission of all parties should be proved, the submission of one being the consideration for the submission of the others. The extent of the implied authority of one partner to bind another was much discussed in the case of *Dickinson v. Valpy* (b). It was there held that an authority to draw bills exists only "where it is necessary for the purpose of carrying on a trading partnership." The rule is stated by Mr. Justice Parke in the following terms:—"Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged." It cannot be said that the authority of submitting to a reference is either necessary for carrying on the trade, or that it has been usually exercised by partners. From these authorities it appears that one partner has no power to bind another, except with regard to matters which are essential to the proper management and carrying on of their mutual trade, and that a submission to reference is not one of such matters. The point has been considered as decided since the case of *Stead v. Salt*, and this rule cannot be made absolute without overthrowing that decision.

*Hill and Humphrey, contra*, abandoned the first point.

(a) 7 B. & C. 427; 1 Man. & Ry. & Ry. 88.  
222, S. C. See also *Brasier v. Jones*, 8 B. & C. 124, S.C.; 2 Man. Ry. 125, S. C.

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The text writers on the law of partnership still continue to treat this as an open question; and upon principle there is no reason why one partner should not possess the power of binding his co-partners by a submission to arbitration. It cannot, indeed, be contended that one partner possesses authority to bind another by deed; but that rests upon particular reasons, referred to by Lord Kenyon, in the case of *Harrison v. Jackson* (*a*), viz., that one partner shall not have power by such an act to bind the lands of his co-partners. Upon an examination of the powers vested in one partner with regard to another, they will appear to be of a nature quite as extensive as that of submitting to arbitration. One partner may release a debt after action brought, and, consequently, the action itself; he may likewise stay proceedings in the action; he may give a note under the Lords' Act, which shall bind his co-partner; he may give a notice to quit, for himself and his partners; he may give a guarantie; he may sue out a fiat, vote in the choice of assignees, and sign the bankrupt's certificate; he may receive payment of a debt, and give a discharge for it. [Parke, B.—Here you contend that he may impose a fresh liability upon his co-partner, which is very different from the case of a discharge upon payment. Lord Abinger, C. B.—If he should improperly release a debtor to the firm, the question would still remain open between him and his co-partners.] So, if he should improperly submit to arbitration, it would not conclude the matter as between himself and the other members of the firm. It is an anomaly to say that a partner who has power to bind his co-partners by making a contract with regard to partnership matters, and by payment in pursuance of that contract, should not have power to bind them with regard to what may be a most necessary intermediate step, viz. ascertaining the

liability, or the extent of the liability, of the firm under the contract so made. In former times, the policy of courts of law was to discountenance arbitrations; but latterly they have leaned to this mode of terminating disputes; and such also has been the disposition of the legislature, as is apparent from the act for the further amendment of the law (a). [Lord *Abinger*, C. B.—I have always thought that policy is the last guide to which the Judges of the Courts of law ought to resort. If, indeed, there be no decisions which can govern them, and no principles which can lead them on their way, then, and then only, according to the light of their own imperfect minds, they must endeavour to discover and lay down such rules as they conceive best adapted to promote the good of the public.] The case which has been relied upon of *Stead v. Salt* was the case of a partnership in a particular transaction, and not of a general partnership, as here; and upon that circumstance Mr. Justice *Bayley*, before whom the cause was tried, appears to have founded his opinion that the instrument of submission was insufficient. In *Strangford v. Green* (b), which was an action for non-performance of an award, the Court said—“The defendant may undertake for his partner.” [Lord *Abinger*, C. B.—The Court did not say that the undertaking would bind the partner, but merely the defendant who gave it.]

**Lord ABINGER, C. B.**—I think we have sufficient authority for saying, that one partner cannot bind another by a submission to arbitration, without the assent of the latter. I do not mean to say that such assent must be given in any particular form of words, or that it requires to be under the hand of the copartner; all that is necessary is, that there should be some evidence of an actual authority conferred. Such a power does not arise out of the relation

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(a) 2 & 3 W. 4, c. 42.

(b) 2 Mod. 228.

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of partnership, and is not, therefore, to be inferred from such relation. The case of *Stead v. Salt* is in point, and I think there is no ground for the distinction which has been taken between a general partnership, and a partnership in a particular transaction.

PARKE, B.—I am entirely of the same opinion. The authority to bind a partner to submit to arbitration does not flow from the relation of partnership, and where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. The case of *Stead v. Salt* shews that the relation of partnership does not communicate any such power as that which has been contended for.

The rest of the Court concurred; but in consequence of an arrangement between the parties, the Court directed the rule to be made absolute.

Rule absolute.

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#### BYAS v. WYLIE.

To an action by the drawer against the acceptor of a bill of exchange, the defendant pleaded that before, &c. it was agreed between the plaintiff and de-

**A**SSUMPSIT by the drawer against the acceptor of a bill of exchange for 120*l.*, drawn the 26th *March*, 1833, and payable six months after date; with counts for goods sold, and on an account stated. *First Plea*—No consideration for the acceptance, or payment by the defendant. *Second Plea*—

plaintiff should consign to *J.N.* certain goods, and that out of the proceeds of those goods the plaintiff should direct *J.N.* to pay to the defendant a sum equal to the amount of the bill; and that in case the proceeds should not have arrived in *England* when the bill became due, the plaintiff should renew the bill. The plea then stated, that the proceeds had not arrived when the bill became due; that the plaintiff declined to draw another bill; that it was thereupon agreed that the defendant should write to *J.N.*, directing him to pay the whole of the proceeds to the plaintiff. That the defendant did thereupon write such letter and delivered it to the plaintiff. The plea lastly averred, that the defendant had not received any consideration for the payment of the bill. On special demurrer:—*Held*, that the plea was repugnant.

As to the said first count, "that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant as to the said first count, because he says, that before and at the time of the making of the bill of exchange and acceptance thereof by the defendant, in the first count mentioned, to wit, on the day and year first aforesaid, it was agreed by and between the plaintiff and the defendant, that the plaintiff should consign certain goods, to wit, five hundred gallons of bottled porter, and five hundred gallons of wine, and certain other merchandizes, in the whole of great value, to wit, of the value of 300*l.*, to one *James Norman*, in certain parts beyond the seas, to wit, in the *West Indies*, to be there sold and disposed of, and that the defendant should accept the said bill in the said first count mentioned, and deliver the same to the plaintiff, in order that the plaintiff might procure the same to be discounted, and receive the amount thereof to and for his own use and benefit. And it was also then agreed between the plaintiff and the defendant, that a certain sum of money, to wit, the sum of 120*l.*, being a sum equal to the amount of the said bill of exchange, should be remitted and paid to the defendant out of the proceeds of the goods so consigned as aforesaid, when the same should have been sold and disposed of, in order to enable the defendant to pay the said bill when the same should have arrived at maturity; and that the plaintiff should write a letter to the said *James Norman*, requesting him to remit and pay to the defendant the said sum of 120*l.*, being the amount of the said bill of exchange, for the purpose of paying the said bill when it should have arrived at maturity. And it was also then agreed between the plaintiff and defendant, that, in case the said goods should not have been sold and disposed of, and the proceeds of the said sale should not have arrived in *England* at the time when the said bill should have become payable, that then the said bill should be renewed,

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BY AS  
a.  
WITNESSED.

and the defendant should, in lieu thereof, accept another bill to be drawn upon him, payable at a future time, in order that the defendant might not be called upon to pay the amount of the said bill before the said goods should have been so sold and disposed of, and a sufficient sum to satisfy the amount of the said bill should have been paid to, or come into the hands of the defendant out of the proceeds of the said sale. And the defendant further says, that in pursuance of the said agreement, so made as aforesaid, the plaintiff did afterwards, to wit, on the day and year first aforesaid, consign the said goods to the said *James Norman*, who accordingly received the same for the purpose of being sold and disposed of as aforesaid; and the defendant then accepted the said bill of exchange, in the said first count mentioned, on the terms aforesaid; and the plaintiff did then write a letter to the said *James Norman*, requesting him to remit and pay to the defendant the sum of 120*l.* out of the proceeds of the goods so consigned as aforesaid, when the same should have been sold and disposed of, for the purpose of enabling the defendant to pay the amount of the said bill of exchange when it should become due and payable. And the defendant further says, that afterwards, to wit, on the 29th day of *September*, in the year aforesaid, the said bill of exchange, in the first count mentioned, became due and payable, and the proceeds of the said goods so consigned as aforesaid had not arrived in *England*; and the defendant then was, and from thence hitherto has been, ready and willing to renew the said bill, and to accept another bill in lieu thereof, to be made and drawn on him, the defendant, in manner and on the terms aforesaid, of all which premises the plaintiff then had notice; but the defendant in fact says, that the plaintiff then declined to draw any bill upon the defendant, to be accepted by him in lieu of the said bill of exchange in the first count mentioned, and so due and payable, or to receive from the defendant any such bill so accepted.

And the plaintiff then requested the defendant, that in lieu of paying the said bill, in the said first count mentioned, or renewing the same, he, the defendant, would write a letter to the said *James Norman*, for the purpose of relinquishing all right and claim on the part of him, the defendant, to receive the said sum of 120*l.*, or any part thereof, out of the proceeds of the said goods so consigned as aforesaid, and requesting the said *James Norman* to remit and pay to the plaintiff the whole of the proceeds of the said goods; and the defendant did accordingly afterwards, to wit, on the day and year last aforesaid, write a letter to the said *James Norman*, and delivered the same to the plaintiff, whereby he, the defendant, did relinquish and give up all right and claim to receive the said sum of 120*l.*, or any part thereof, out of the proceeds of the goods so consigned as aforesaid, and did request the said *James Norman* to pay the whole of such proceeds to the plaintiff; and the plaintiff then accepted and received the said letter. And the defendant says, that he has not received any value or consideration for the payment by him, the defendant, of the bill of exchange in the first count mentioned, and this he is ready to verify, &c. Wherefore," &c.

Demurrer to the *second* plea, shewing for cause, that the said bill of exchange is alleged to have been given upon an agreement as to payment inconsistent with the tenor of the bill itself; and that the said plea is double, and contains two alleged answers to the said action, to wit, *first*, that the said bill was given on an agreement for renewal, and, that the plaintiff had refused to accept a renewed bill; and, *secondly*, that the plaintiff had requested the defendant, in lieu of payment, to write a certain letter, and that the plaintiff accepted the said letter; and that the said plea amounts to an accord without satisfaction; and that the said plea is repugnant, and in the first part of it shews a consideration for the said bill, which is alleged to have

Ezeb. of Pleas,  
1835.

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*Exch. of Pleas,* partly failed, and afterwards alleges, that the defendant  
 1836. has received no consideration for the said bill; and that the  
 BYAS v.  
 WYLIE.

*Cleasby*, in support of the demurrer.—The plea is double, and contains two alleged answers to the action:—*first*, that the defendant is only liable upon a contingency which has never taken place, (which in itself is a defence); and, *secondly*, that he is not liable in consequence of the arrangement entered into subsequently to the bill becoming due, respecting the letter to *Norman*. Where a defendant relies upon two facts, either of which is an answer to the plaintiff's demand, he cannot join these two defences in one plea; and if he does so, it is demurrable for duplicity (a). [Lord *Abinger*, C. B.—The plea seems rather to be a narrative of the transaction, which forms the whole of the defendant's case, than a statement of two different and separate grounds of defence. The defendant does not rely upon the giving of the letter to *Norman* as being his defence, but upon that fact in connexion with the circumstances previously stated.] If the facts formed links in one chain of defence, the whole plea might be regarded as the statement of a single defence; but it would be very difficult to deal with such a plea. [Lord *Abinger*, C. B.—The plaintiff must select some material fact, and traverse it; as, for instance, the contract to forward the goods to *Norman*. The rest of the plea would then fall to the ground. *Parke*, B.—The whole plea appears to be a special accord and satisfaction.] Then, the plea is repugnant. It sets forth, in the commencement, an agreement between the plaintiff and defendant, that the plaintiff

(a) *Bleeke v. Grove*, 1 Sid. 175; 1 Keb. 661, S. C. Bac. Ab. Pleas and Pleadings (K. 2),

should consign certain goods to *Norman*, and, at the conclusion, it alleges, that the defendant has not received any value or consideration for the payment by him of the bill. Now, the agreement was a sufficient consideration.

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*Wightman, contrà.*—The defendant admits that there was a sufficient consideration in the agreement for the *acceptance* of the bill; but, he denies that there was, after the non-receipt of proceeds from *Norman*, any consideration for the *payment* of the bill. To that defence only the plea is directed. A distinction must be observed between the first and second parts of the transaction. The defendant was bound to accept the bill, but he was not bound to pay it, unless the proceeds were received from *Norman*. That fact, therefore, is properly pleaded, as shewing that there is no consideration for the payment of the bill by the defendant.

*Per Curiam.*—*Prima facie* there is a repugnancy between the commencement and conclusion of the plea. The allegation of want of consideration is not sufficiently confined to the non-receipt of the proceeds of the consignment to *Norman*. The plea should have stated, that there was no other consideration than that before mentioned. We have not the least doubt that the plea is not good; but the defendant may have leave to amend.

Leave to amend, on payment of costs.

*Exch. of Pleas,*  
1835.

Mozley and Another v. TINKLER.

Guarantie in the following form :  
 " *F.* informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to *B.*" Signed "G. T." *B.* wrote this memorandum, and added " Witness to G. T.—J. B." It was forwarded by *B.* to the plaintiffs, who never communicated their acceptance of it to *G. T.* In an action against the latter on the guarantie :—  
*Held*, that the plaintiff, not proving any notice of acceptance to the defendant, were not entitled to recover.

**ASSUMPSIT** upon the following guarantie, which was in the form of a letter addressed to the plaintiffs.

" *Doncaster, July 5, 1833.*

" Gentlemen,—Mr. *France* informs me, that you are about publishing an arithmetic for him and another person, and I have no objection to being answerable as far as 50*l.* For my reference, apply to Messrs. *Brooke & Co.* of this place.

" I am, Gentlemen, your most obedient servant,  
 " *Geo. Tinkler.*"

" Witness to Mr. *Tinkler*,  
 " *J. Brooke.*"

" To Messrs. *Mozley & Son, Derby.*"

The defendant pleaded—*First*, the general issue; *secondly*, that the promise was a special promise to answer for the debt of another, and that there was no agreement in writing, or memorandum, wherein the consideration for the promise was stated, signed by the defendant, &c.; and, *thirdly*, that the plaintiffs did not proceed in the printing and publishing of the book on arithmetic, &c. To the second plea the plaintiffs replied, that there was an agreement in writing, &c.; and took issue on the last plea.

At the trial, before *Vaughan, B.*, at the last Summer Assizes for the county of *Derby*, it appeared, that a person named *France*, being desirous of publishing a work on arithmetic, applied to the plaintiffs, who were printers and publishers in the town of *Derby*, to publish the same. The plaintiffs did not reply directly to *France*, but addressed themselves to *Brooke*, a bookseller in *Doncaster*, through whose intervention the publication of the book by

the plaintiffs was arranged, and the garantie in question given. To *Brooke* the garantie referred as a voucher for the respectability of the defendant. The memorandum was written by *Brooke*, and read over by him to the defendant; and the words at the foot of it, "Witness to Mr. *Tinkler, J. Brooke*," were also in his hand-writing. The garantie having been forwarded to the plaintiffs through *Brooke*, the work was proceeded with, and the bill was made out to *France*. In the month of *October*, a person named *Cunningham*, who was joint editor of the work, made application to the plaintiffs for nine copies of it, when the following letter was received by him in reply:—

“*Derby, October 29, 1833.*

“Sir,—In answer to yours of the 27th, we beg to state, that we shall be very glad to supply you with the Arithmetic; but, considering that we must look to what we have in hand as our security, and also, as Mr. *France* is the only person who is responsible to us for the payment, and we are responsible to him for what copies we part with, we must decline parting with any, without having cash for them, &c.

(Signed)                  “*Henry Mosley & Son.*”

“P. S.—You say you are happy to find we are safe in the books already delivered. We do not know how we are safe; but, we assure you, we have not yet received any money at all from Mr. *France*, or any one else.”

No communication was made by the plaintiffs to the defendant after the receipt by them of the garantie; and it was objected, on the authority of *M'Iver v. Richardson* (a), that, as there had been no acceptance of the garantie by the plaintiffs proved, they were not entitled to recover. A verdict was, however, found for the plaintiffs; but the learned Judge gave the defendant liberty to move to enter

Ex'tl. of Plts.,  
1838.

Mosley  
“  
Tinkler.

*Esch. of Pleas,* a nonsuit. *Hill*, accordingly, in *Michaelmas Term*, obtained a rule *nisi* to that effect; against which,

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*Amos*, and *Humfrey*, now shewed cause.—The acceptance of the guarantie was a matter of fact to be left to the jury, and they have determined it by finding a verdict for the plaintiffs. *Brooke* may be said to have been the agent of both parties; of the defendant, for the purpose of forwarding, and of the plaintiffs for the purpose of accepting the guarantie; and after the instrument had been read over by him to the defendant, the latter could not doubt that there was an acceptance of it by the plaintiffs through the instrumentality of *Brooke*. [Parke, B.—The difficulty is this, whether the plaintiffs ought not to have communicated to the defendant that they were satisfied with his security; but no evidence was given to that effect.] If *Brooke* was satisfied, it was equivalent to the plaintiffs being satisfied; and the defendant knew that he was satisfied, by his permitting the reference to himself, and forwarding the guarantie to the plaintiffs. [Parke, B.—The transaction is in fact this:—“I will give my guarantie, provided you shall be satisfied of my solvency.” Then it was incumbent on the plaintiffs to give notice to the defendants, that they were satisfied.] The act of *Brooke* is the act of the plaintiffs. [Parke, B.—Upon *Brooke’s* approval the plaintiffs might still have exercised their own discretion, and have rejected the guarantie. The simple question is, whether they ought not to have communicated their satisfaction?] There was sufficient evidence to go to the jury upon that question. Immediately upon receiving the guarantie, the plaintiffs proceeded with the publication of the work; and the jury might reasonably infer, that the defendant was aware of the plaintiffs thus proceeding upon the credit of his engagement.

*Hill*, in support of the rule.—The question is, was there

a contract binding upon the defendant? Until an acceptance of the contract by the plaintiffs, notified to the defendant, the instrument did not become binding; and there was no evidence of such a notification. In the words of Lord *Ellenborough*, in *M'Iver v. Richardson*, this was only "a proposition tending to a garantie," and not a full and perfect garantie until accepted by the other party. The distinction through all the modern cases is between a proposition or overture towards a garantie, and the garantie itself, when perfect by the assent of both parties. *Hill* was then stopped by the Court.

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**LORD ABINGER, C. B.**—The case of *M'Iver v. Richardson* is not so strong as the present to shew that there was intended to be a suspension until something further should be done. That case has never been impugned, and the present comes clearly within the principle there established. The transaction cannot be tortured into a consummate and perfect contract. The contract was not complete till notice; and, with regard to the agency of *Brooke*, there is nothing to shew that the plaintiffs might not have been dissatisfied with his opinion of the defendant's solvency.

**PARKE, B.**—I am entirely of the same opinion. It is not necessary in a contract of this nature that both the parties should be bound; it is sufficient if the party sued is shewn to be liable. If the garantie had stopped at the words "50L," I should still have been inclined to think, on the authority of *M'Iver v. Richardson*, that the plaintiffs ought to have given notice to the defendant, that they had accepted his garantie. But the subsequent words render the point quite clear, that the defendant only intended to be bound by the instrument, in case, upon inquiry, the plaintiffs should be satisfied with regard to his solvency. Now, according to the principles of law, that satisfaction being a matter peculiarly within the plaintiffs'

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own knowledge, they ought to have given evidence of it. Suppose the fact had been averred in pleading, the proof of the averment would have been upon them. In *Com. Dig. Pleader* (C. 73), it is said, "that in an action to deliver so much corn, if the plaintiff approve of it at the fair, the plaintiff ought to give notice if he approved of it (a)." So, here the satisfaction of the plaintiffs, being within their personal knowledge, ought to have been proved by them, the whole matter being open under the general issue. But it is said, that the plaintiffs appeared to be satisfied, because *Brooke* was satisfied, of which the defendant was aware; but that is not so, for *Brooke* merely acted in his character of referee, and communicated his opinion to the plaintiffs, in order that the latter might form their own judgment upon the question. After they had done so, they ought to have communicated the result to the defendant. This not appearing to have been done, the rule for entering a nonsuit must be made absolute.

The rest of the Court concurring,

Rule absolute (b).

- (a) Cro. Eliz. 249, 250. N.P.C. 10; *Symmons v. West*, 2  
 (b) See *Gaunt v. Hill*, 1 Stark. Stark. N. P. C. 371.

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#### HORSFORD v. WEBSTER and DEACON.

A tenant gave a bill of sale to a creditor, under which his goods (including cer-

**TRESPASS** for taking the plaintiff's cattle:—Plea, the general issue. At the trial before *Taunton*, J., at the

time (including certain cattle) were about to be sold, and the landlord, before the sale took place, put in a distress; whereupon it was agreed, that the sale by the creditor should proceed, and that the landlord should be paid his arrears out of the proceeds of the goods and cattle. The plaintiff having purchased the cattle at the sale, put in his cattle to depasture it; and the amount of the sale not being sufficient to cover the arrears of rent, the landlord distrained again, and took those cattle as a distress:—*Held*, (*Parke, B., diss.*) that a contract was to be implied on the part of the landlord not to distraint the cattle of the purchaser of the cattle.

last assizes for the county of *Northampton*, the following facts were proved. A person named *Kingston*, being tenant to the Earl of *Winchilsea* of a farm, certain rent became due at *Michaelmas*, 1833, for which, in the month of *November* in that year, his lordship distrained. Amongst the property distrained was a close of growing grass (called eatage.) In the same month of *November*, but previously to the distress being made, *Kingston* executed to the plaintiff a bill of sale of all his farming stock and goods, including the eatage. The defendant, *Webster*, who was the agent of Lord *Winchilsea*, was present at the sale, and permitted the goods to be sold under the bill of sale, upon condition that the proceeds should be paid into the hands of the defendant, *Deacon*, in discharge of the landlord's rent. The sale accordingly proceeded, and the plaintiff became the purchaser (amongst other things) of the close of eatage; and it was stated at the time of sale, that he should have liberty to consume the grass in the close until the 25th *February*, that being the termination of *Kingston's* interest in the premises. The proceeds of the sale were paid over according to the agreement; but there being a deficiency of about 40*l.* in the payment of the rent, the defendant, as the agent of Lord *Winchilsea*, made a second distress for that amount, and seized the cattle of the plaintiff, the subject of this action, which were at the time depasturing in the close of eatage, purchased by him under the circumstances above stated. The learned Judge being of opinion that the landlord was justified in making the second distress for the arrears of rent remaining unpaid, directed a nonsuit, with liberty to the plaintiff to move to enter a verdict for 17*l.*, being the value of the cattle taken. *Hill* having in *Michaelmas* Term obtained a rule accordingly,

*Adams*, Serjt., and *Amos*, now shewed cause.—The general rule of law is, that until the landlord is satisfied his

*Each. of Pleas,  
1835.*

*Horsford  
a.  
Webster.*

*Exch. of Pleas,* arrears of rent, he may enter upon any part of the premises demised, and take as a distress the goods, either of the tenant or of a stranger, there found; and there is nothing in the circumstances of the present case to take it out of the general rule. The most extensive construction has been given to this rule; and it has been held, that, where the cattle of a stranger have been put into land for the purpose of agistment, though with the consent of the landlord, they may yet be distrained by him (a). So it has been decided that cattle going to market, put into a close for one night only, by the assent of the landlord, and with the leave of the tenant, are subject to the landlord's distress, &c. *Fowkes v. Joyce* (b). There was no evidence to shew that the landlord had waived his right of distress, or that the plaintiff put his cattle upon the premises, under the faith, and in the presumption, that the landlord would not distrain; on the contrary, the presumption would be, that if there was any rent in arrear, the tenant would pay it, and that no distress would take place. Is there any fact in the case to shew, that if the tenant himself had put his cattle to depasture in the close in question, the landlord would have been tied up from distraining for the rent remaining unpaid? The plaintiff merely stands in the place of the tenant, and has no protection against the distress but such as the tenant himself had.

*Hill and Waddington, contra.*—The plaintiff was a creditor of the tenant, and took from him a bill of sale. The landlord had distrained, and could not sell until after the expiration of the usual time; but, by an arrangement amongst the parties, the sale takes place under the plaintiff's bill of sale, and the landlord receives the proceeds at an earlier period than he otherwise would have done. The landlord, through his agent and bailiff, sanctions this

(a) *Read v. Burley*, Cro. Eliz. 549.

(b) 2 Ventr. 50; 3 Lev. 260; 2 Lutw. 1161, S. C.

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arrangement, and thereby, as against the parties to the transaction, waives his right of distress. Here, then, is a contract on the part of the landlord, and a sufficient consideration to support that contract. The situation of the plaintiff was entirely altered by this arrangement, without which, he would have taken care, that the proceeds of the sale should never have reached the hands of the landlord.

[*Parke, B.*—The landlord had no power to take the eat-age (*a*); that part of the tenant's effects was not distrainable. But suppose the landlord had recovered a judgment against his tenant, and, upon the plaintiff being about to sell the goods, had said, “I will not enforce the judgment, if you will pay over to me the proceeds of the sale;” would that have prevented him from making a subsequent distress?] It would, if in consequence of that arrangement the plaintiff had, as in the present case, been induced to put his cattle to depasture upon the premises. With regard to the presumed contract not to distrain, it is said, that the fact of rent being in arrear was not in the contemplation of the parties; but it was extremely probable that the proceeds of the sale would not cover the rent, and in fact they did not cover it by the sum of 40*l.* The right of the landlord in all cases to distrain the cattle of strangers is not so unqualified as it has been supposed on the other side. The authority of *Fowkes v. Joyce* has been denied, in a case cited by Professor *Christian*, in his notes to *Blackstone's Commentaries* (*b*); and Serjeant *Williams* observes, that it should seem at this day a Court of law would be of opinion, that cattle belonging to a drover being put into a ground, with the consent of the occupier, to graze only one night, in their way to a farm or market, will not be liable to the distress of the landlord for rent (*c*). . . . Besides, the present case is very different from that of *Fowkes v. Joyce*.

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(*a*) See *Gilb. Repl.* 39.                           Geo. 3; 3 Bl. Com. 8, 15th ed.

(*b*) *Tate v. Gleed*, C. B. H. T. 24                   (*c*) 2 *Saund.* 290, n.

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There was no consideration there for the landlord forbearing to distrain, but here he had a good consideration, not only in receiving the proceeds of the eatage, which he could not have obtained under his distress, but likewise in anticipating the fruits of that distress. That the power of a landlord to distrain is by no means so universal as has been supposed, appears also from the note to the case of *Poole v. Longuevill* (a). It is there said, that the settled distinction seems now to be, that if cattle escape through defect of fences, which the *tenant* of the land is bound to repair, they cannot be distrained by the landlord for rent, though they have been levant and couchant, for the landlord *shall not take advantage of his own wrong*; and the case of *Poole v. Longuevill* is denied to be law.

Lord ABINGER, C. B.—It appears to me, that there was evidence to go to the jury of a contract on the part of the landlord, that the purchaser of the eatage should be allowed to put his cattle into the close in question without being subject to a distress for rent. The plaintiff and the defendant *Webster*, the agent of the landlord, come together, and between them the arrangement is made that the sale shall proceed, and that the landlord shall have what the eatage produces, to which under the distress he would not have been entitled. This I think a sufficient consideration for a promise not to take the cattle of the person who, under the sale, becomes the purchaser of the eatage. The plaintiff becomes the purchaser. He is to have the eatage, and the landlord is to receive the money. The question is, whether, upon this state of facts, there was not sufficient ground for a jury to infer, that the party purchasing understood that he was to enjoy what he bought; and whether in fact the transaction did not amount to an undertaking on the part of the landlord that he would not deprive him of that enjoyment. It seems to me that there were sufficient grounds for such an inference.

**PARKE, B.**—I am of opinion that this rule ought not to be made absolute. If, as my Lord thinks, there was evidence from which a contract not to distrain might be inferred, then a new trial, and not the entering a verdict for the plaintiff, would be the proper course; but, in my opinion, there was no evidence from which a jury could presume the existence of such a contract. Suppose that the case had arisen upon the pleadings—that instead of pleading the general issue, and giving the justification in evidence under it, according to the statute, the defendant had pleaded the distress specially—what must the plaintiff have replied? I put this case to the learned counsel for the plaintiff during the argument, and his answer was, that the plaintiff must have replied the contract; that is, that in consideration that the plaintiff would pay over to the landlord the proceeds of the sale of the eatage, the landlord promised that he would not distrain the cattle put into the close for the purpose of depasturing that eatage. But what evidence is there to maintain the statement of such a contract? The case was this. Rent became due at *Michaelmas* to the amount of about 200*L*, and a distress was made upon all the distrainable effects of the tenant. Previously to the distress, however, there had been a bill of sale executed to the plaintiff, not only of all the tenant's distrainable effects, but likewise of the close of eatage. The sale under the bill of sale being about to take place, *Webster*, the bailiff of the landlord, interposes, and says: “I will not proceed with the distress, provided you will pay over the amount received from the sale of the eatage in discharge of the rent.” It is said, that this furnishes evidence of a contract; but I do not think so. At the time of this arrangement neither party contemplated the necessity of a second distress. The case appears to me to be no stronger than if the landlord had undertaken not to proceed with his distress, provided the amount arising from the sale of goods on a particular part of the estate should be applied

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in discharge of a debt due from the tenant to himself. Or suppose there had been a sub-demise of part of the land, and it had been agreed that the rent due from the sub-lessee should be applied in discharge of the rent in arrear from the lessee to the landlord, could a waiver of his right of distress be implied from such an agreement?

**BOLLAND, B.**—I am of the same opinion as the Lord Chief Baron. The eatage is about to be sold, when the defendant, *Webster*, interposes, and warns the parties of the distress which he was about to enforce. An arrangement is then entered into, and that arrangement holds out to the parties that they will be protected in the enjoyment of the property of which they become the purchasers under the sale. At first I was struck with the case of *Fowkes v. Joyce* (a). The point there was, whether the plaintiff had any right to the privilege of having his cattle unmolested. There was in fact no consideration to support the grant of any such privilege; but, suppose the landlord there had by agreement taken a portion of the rent from the owner of the cattle, could he afterwards have distrained?

**GURNEY, B.**—I also am of the same opinion. The landlord received the proceeds of the sale upon condition that he should not distrain. Any other construction would render the transaction merely a trap for the cattle of any person who purchased the eatage sold under the sanction of the landlord himself. The landlord received as a consi-

(a) *Ante*, p. 698. Upon this case C. B. *Gilbert* observes, “*Note* —the grazier was afterwards relieved in equity, it being deemed a fraud in the lessor. 2 *Vern.* 129. *Prec. Ch.* 7.”—*Gilbert on Repl.* In 2 *Vernon* (p. 131), a case of *Bro-*

*don v. Pierce* is mentioned, where, there being twenty years’ arrear of a rent-charge, and cattle coming by escape out of the next ground, and being distrained, Lord *Nottingham* decreed against the distress.

deration the proceeds of effects not distrainable by himself; and it was a breach of faith afterwards to take as a distress the cattle of a person who put them upon the close on the faith of the landlord's engagement.

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Rule absolute.

FOSTER v. JOLLY.

**A**SSUMPSIT by the payee against the maker of a pro-missory note for 12*l.*, payable fourteen days after date. Plea, the general issue. At the trial, before *Gurney, B.*, at the last assizes for the county of *Lancaster*, it appeared that *Samuel Milnes*, the brother-in-law of the defendant, being agent for a co-operative society, and having ordered goods for the society from a person named *Walker*, which had not been paid for, the plaintiff, as the attorney of *Walker*, sued *Milnes* for the amount. *Milnes* then gave the names of certain members of the society, who were also sued for the debt, and a verdict obtained. *Milnes* also gave a cognovit, and, judgment being entered up, he was taken on a *ca. sa.*, and while in prison, the defendant gave the note in question for the amount of the demand against *Milnes*. The defendant now proposed to shew, that the note was given under an agreement that it should not be enforced, in case *Walker* should obtain a verdict in the action against the members of the co-operative society. On the part of the plaintiff, it was objected that parol evidence of the agreement was inadmissible to vary the terms of the written instrument, and also that the agreement was that the note should not be put in suit, only in case *Walker* obtained the fruits of his verdict. The learned Judge, however, admitted the evidence, giving the plaintiff leave to move to enter a verdict for 12*l.*, if the Court should be

Where a note is made payable fourteen days after date, parol evidence cannot be given to shew that it was not to be paid, in case a verdict was obtained in an action brought between other parties.

A motion for a new trial in an action brought in the *Common Pleas at Lancaster*, must be made in the Court in which the Judge sits who presided at the trial.

*Exch. of Pleas.* of opinion that the evidence was inadmissible. In the course of last term, *Wightman* accordingly obtained a rule (a), and—

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*Alexander* now shewed cause. The evidence was admissible. Though the terms of a note be absolute, parol evidence may be given to shew that the holder agreed not to sue a party to it. This evidence was admitted in *Pike v. Street* (b), which was an action by the indorsee against the indorser of a bill; and Lord *Tenterden* permitted the defendant to shew a parol agreement by the plaintiff to sue the acceptor only. In summing up, he left it to the jury to say, whether or no the plaintiff took the bill on the terms and conditions that he should have recourse to the acceptor, and to the acceptor only, and not sue the defendant at all; and, if so, he directed them to find for the defendant, such an agreement being a good bar to the action. [*Parke*, B.—The effect of that case only is, that the defendant may deny the *prima facie* evidence of consideration.] The case is cited for the *dictum* of Lord *Tenterden*, that a parol agreement of this kind is a good bar to the action. The agreement in this case is of a similar nature. It is not a universal rule that parol evidence may not be given to contradict the terms, express or implied, of a bill or note. Where a bill purports to be “for value received,” it is competent to the party sued upon it to shew, that, in fact, no value has been received;

(a) This action was brought in the Common Pleas at Lancaster, and the motion to enter a verdict was made under the statute 4 & 5 Will. 4, c. 62, s. 26. By that statute, the application may be made to any of the superior Courts of common law at Westminster, and accordingly *Wightman* moved, in the first instance, in the Court of

King's Bench; but Lord *Densmore*, C. J., said, that the Judges had resolved that the motion should be made in the Court in which the Judge sits who presided at the trial.

(b) *Moo. & Mal.* 226; and see also *Hall v. Wilcox*, 1 *Moo. & Rob.* 58.

so, it is every day's practice to contradict, by oral evidence, the implied consideration which every bill or note carries with it. In moving for this rule, the case of *Moseley v. Hanford* (a) was mentioned; but that decision is distinguishable. The agreement there, that the note should be payable on the delivery up of the possession of certain premises, was directly at variance with the terms of the note, which was payable on demand; but no such necessary contradiction exists in the present case. The proposed evidence tends rather to negative any consideration, than to impugn the terms of the instrument.

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*Wightman, contrà.*—The decision of the Court of *King's Bench* in *Moseley v. Hanford* goes the whole length of the present case. [Lord *Abinger*, C. B.—Does not the question arise, whether the note was given as a collateral security in case *Walker* should not obtain the fruit of the verdict? That would go, not to vary the terms of the note itself, but to affect the consideration only.] The note was not given as a collateral security, but was, by the terms of the parol contract, made defeasible in a certain event. Now that, according to all the authorities, is such a variation of the written contract as cannot be introduced by parol. There was no evidence to shew that it was given as a collateral security. [*Gurney*, B.—The jury found, that it was given upon the agreement relied on by the defendant. *Parke*, B.—The question is, whether parol evidence was admissible in this case to contradict the averment or inference of value which every note bears. Lord *Abinger*, C. B.—You may give in evidence any facts to affect the consideration.] It is true that the defendant is at liberty to deny the consideration, but that is not what he has done here. He sets up an independent collateral fact, uncertain with

(a) 10 B. & C. 729.

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regard to the time of its happening, yet upon the happening of which, the note is to cease to have any operation. He does not say that the note had not originally a good consideration, he does not say that such consideration ever failed, but he imports by parol a contingency into the note, which does not appear on the face of the instrument. Suppose a note made on the 1st of *September*, and payable in fourteen days, subject to be defeated upon a given uncertain event, as in this case, and suppose such event not to happen until after the day of payment—the holder would undoubtedly be entitled to recover upon the note becoming due; and how could the happening of the event defeat that right, unless by altering the terms of the contract? [*Alderson*, B.—If the evidence attempted to be given would render it uncertain, whether on a particular day the maker would or would not be liable, it is a variation of the contract. A note payable upon a contingency, as upon the arrival of the ship *Juno*, would not be a good note; but the note in question is not contingent, and to allow parol evidence of its being so would be to vary the contract.] The cases put by way of illustration on the other side shew that there must be a good defence when the note becomes due, as in the case of want of consideration. The question comes to this:—suppose that on the note being dishonoured, an action is brought upon it, can the defendant shew that it is not payable upon the day on which it purports on the face of it to be payable? In *Free v. Hawkins* (a), which was an action by the indorsee against the indorser of a note, the defendant attempted to prove by parol evidence that the plaintiff knew that the note was not to be enforced until after certain property of the maker was sold, and then only in the event of the proceeds not being sufficient; that this was the agreement upon which the note was given, and that

(a) 8 *Taunt.* 92; *Holt, N. P. C.* 550, S. C.

it was only a collateral security; but *Gibbs*, C. J., rejected the evidence; and the Court of *Common Pleas* held it rightly rejected. *Woodbridge v. Spooner* (*a*), and *Rawson v. Walker* (*b*), are to the same effect; and these cases have been confirmed by *Moseley v. Hanford*.

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**Lord ABINGER**, C. B.—At the commencement of the argument, I felt some doubt, whether this might not be regarded as a question of consideration; but the reasoning of Mr. *Wightman* has placed it in another light, and I am opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration, or collateral security. The consideration of the instrument was not impeached, nor was it given as a collateral security, but the defence attempted to be established was in direct contradiction of the terms of the note. The maker of a note payable on a day certain cannot be allowed to say, “I only meant to pay you upon a contingency” that is at variance with his own written contract. The case must be governed by that of *Rawson v. Walker*.

**PARKE**, B.—At first I had some doubts upon the point, but I am now satisfied that this evidence ought to have been rejected. Every bill or note contains two things—value either expressed or implied, and a contract to pay at a specified time. The general rule is, that the maker is at liberty to contradict the value as between himself and the party to whom he gave the note; but he is not at liberty to contradict the express contract to pay at a specified time. Here the event upon which the defendant contends that the note was payable was contingent, and might never happen, which is a clear contradiction of

(*a*) 3 B. & A. 235; 1 Chitty, R. 661, S. C.

(*b*) 1 Stark. 361.

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the contract contained in the note. *Ranson v. Walker* is in point; *Pike v. Street* falls within the other class of cases in which the consideration has been contradicted. There the agreement was, that the plaintiff should sue the acceptor of the bill only, and should not sue the indorser, (the defendant). That, as between the plaintiff and the defendant, negatived any consideration, and so was admissible.

**ALDERSON, B.**—Parol evidence is admissible to contradict the consideration or value of a bill or note, but not the terms of the instrument itself. Here the note contains an engagement to pay at a specified time, namely, in fourteen days, and evidence is offered to shew, that this means that the note should be paid upon the occurrence of an event which may happen either before or after the expiration of fourteen days. Such evidence falls within the general rule, that matters in writing shall not be contradicted by parol.

**GURNEY, B.** concurred.

Rule absolute (*a*).

(a) Though parol evidence is not admissible to vary the terms of a bill or note, yet a memorandum in writing upon the instrument, contemporaneous with the making of it, is admissible for that purpose. *Leeds v. Lancashire*, 2 Campb. 205; *Hartley v. Wilkinson*, 4 Campb. 127; *Stone v. Met-* *calf*, 1 Stark. 53. And though the memorandum be made on a separate paper, yet, if contemporaneous, it is admissible between the original parties and their representatives. *Bosseron v. Monteiro*, 4 Taunt. 844; *Gibson v. Scott*, 2 Stark. 286.

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## TURQUAND v. DAWSON.

**ASSUMPSIT** for goods sold and delivered. Plea—The general issue. At the trial, before *Tasnton*, J., at the last assizes for the county of *Derby*, the plaintiff was nonsuited, owing to the absence, as it was contended, of one *Bosworth*, a material witness. It appeared that previously to the trial, which took place on *Thursday*, the last day of the assizes, there had been a negotiation between the parties for the settlement of the action, but that such negotiation went off on the *Wednesday*, and that the plaintiff on that day was aware that the evidence of *Bosworth* would be required. He was accordingly sent for, but his residence being at *Manchester*, he did not arrive until after the trial had taken place, and the assizes terminated, on the *Thursday*. In *Michaelmas Term*, *Whitchurst* obtained a rule to shew cause, why the nonsuit should not be set aside and a new trial had, on the ground, amongst others, that by the fraud and practice of the defendant's attorney, the plaintiff had been prevented from securing the attendance of *Bosworth* at the trial.

Where a material witness for the plaintiff is prevented from attending by the fraud and practice of the defendant's attorney, the plaintiff ought to apply to the Judge to put off the trial, or ought to withdraw the record. If he proceeds to trial and is nonsuited, the Court will not grant a new trial.

*Hill and Bourne*, now shewed cause.—No application has ever been made for a new trial upon grounds like these. The proper mode of redress for such an injury is, a special application to the Court. Can a party be permitted to say, “If I had brought such or such a witness I should have recovered a verdict.” He is bound to secure the attendance of such witnesses as are necessary for the proof of his case, and ought not to speculate upon the chances of his cause being settled. The plaintiff was aware that the negotiation had gone off on the *Wednesday*; and after sending for *Bosworth*, he might have made an application to the Court to postpone the trial, or might have withdrawn the record.

CASES IN THE EXCHEQUER,

There was no consideration there for the landlord to distrain, but here he had a good cause in receiving the proceeds of the eatage, not have obtained under his distress, but if he participated the fruits of that distress. That landlord to distrain is by no means so universal, appears also from the note to the *Longuevill* (a). It is there said, that the sense now to be, that if cattle escape the fences, which the tenant of the land is bound to keep up, cannot be distrained by the landlord for rent, have been levant and couchant, for the landlord may take advantage of his own wrong; and the *Longuevill* is denied to be law.

Lord ABINGER, C. B.—It appears to me, evidence to go to the jury of a contract or agreement between the landlord, that the purchaser of the eatage agreed to put his cattle into the close in question subject to a distress for rent. The plaintiff *Webster*, the agent of the landlord, and between them the arrangement is made, shall proceed, and that the landlord shall receive the eatage produces, to which under the distress he has been entitled. This I think a sufficient ground for a promise not to take the cattle away under the sale, becomes the purchaser of the eatage, plaintiff becomes the purchaser. He is to pay the landlord is to receive the money, whether, upon this state of facts, there is ground for a jury to infer, that the party understood that he was to enjoy what he bought. In fact the transaction did not amount on the part of the landlord that he would give that enjoyment. It seems to me that there are sufficient grounds for such an inference.

PARKE, B.—I am of opinion that this rule ought not to be made absolute. If, as my Lord thinks, there was evidence from which a contract not to distrain might be inferred, then a new trial, and not the entering a verdict for the plaintiff, would be the proper course; but, in my opinion, there was no evidence from which a jury could presume the existence of such a contract. Suppose that the case had arisen upon the pleadings—that instead of pleading the general issue, and giving the justification in evidence under it, according to the statute, the defendant had pleaded the distress specially—what must the plaintiff have replied? I put this case to the learned counsel for the plaintiff during the argument, and his answer was, that the plaintiff must have replied the contract; that is, that in consideration that the plaintiff would pay over to the landlord the proceeds of the sale of the eatage, the landlord promised that he would not distrain the cattle put into the close for the purpose of depasturing that eatage. But what evidence is there to maintain the statement of such a contract? The case was this. Rent became due at *Michaelmas* to the amount of about 200*l.*, and a distress was made upon all the distrainable effects of the tenant. Previously to the distress, however, there had been a bill of sale executed to the plaintiff, not only of all the tenant's distrainable effects, but likewise of the close of eatage. The sale under the bill of sale being about to take place, *Webster*, the bailiff of the landlord, interposes, and says: "I will not proceed with the distress, provided you will pay over the amount received from the sale of the eatage in discharge of the rent." It is said, that this furnishes evidence of a contract; but I do not think so. At the time of this arrangement neither party contemplated the necessity of a second distress. The case appears to me to be no stronger than if the landlord had undertaken not to proceed with his distress, provided the amount arising from the sale of goods on a particular part of the estate should be applied

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*Whitehurst, contra*, contended, that as the absence of *Bosworth* had been caused by the representations of the defendant's attorney, and that as there had not been time to procure his attendance before the assizes terminated, the plaintiff was entitled to a new trial.

**Lord ABINGER, C. B.**—The plaintiff, under the circumstances stated, should have applied to the Judge to postpone the trial of the cause; and the rule that such an application shall not be granted at the request of the plaintiff, is not so inflexible but that, under peculiar circumstances, it may be departed from. If the learned Judge had refused to grant the application, the plaintiff might then have withdrawn the record. But he cannot be permitted to take his chance of success by trying the cause first, and then obtaining a new trial in case of failure.

The rest of the Court concurred.

Rule discharged (*a*).

(*a*) The general rule is, that a new trial will not be granted, on the ground that evidence has not been given, if it might have been given at the trial. *Cooke v. Berry*, 1 Wils. 98. And the Court will not, on a motion for a new trial, hear affidavits of any facts which might have been brought forward at *Nisi Prius*. *Hope v. Atkins*, 1 Price, 143. The plaintiff ought, if unprepared with his evidence, to withdraw the record, and not to take his chance of a verdict. *Harrison v. Harrison*, 9 Price, 89.

The present action was brought by a tailor, to recover the amount of a bill for clothes supplied to the son of the defendant. One of the points argued was, whether

there was authority from the defendant to the son, enabling the latter to bind him. It having been stated that it had been made a question, whether the clothes were necessaries or not, Lord Abinger, C. B., said, that question could only arise in an action against the son. *Whitehurst* observed, that it might arise if the father turned his son out into the streets: but Park, B., said, that the case was different from that of a wife, all whose property becomes vested in her husband; but that the son in such case might provide for himself, and retain any property as against his father, which the wife could not do.

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OWENS v. DENTON.

**T**HIS was an action of *assumpsit* for work and labour, to which the defendant pleaded *non assumpsit*, and a set-off. At the trial, before *Vaughan*, B., at the last *Summer Assizes* for the county of *Denbigh*, the defendant gave evidence, under his plea of set-off, of malt sold and delivered by him to the plaintiff; but it appeared that the malt had been sold by the *hobbit*, and not by the legal measure. It appeared, however, that, after this sale, the plaintiff and defendant had stated and settled an account, in which the claim for the malt formed a part. The learned Judge summed up in favour of the defendant; but the jury having found a verdict for the plaintiff, *Welsby*, in the course of the last term, obtained a rule for a new trial.

Where malt had been sold by *B.* to *A.* by an illegal measure, and after such sale a settlement of accounts took place between the parties, in an action by *A.* against *B.* for work and labour:—*Held*, that the latter was entitled to set-off his demand for the malt.

*John Jervis* now shewed cause.—The only point for the consideration of the Court is, the effect of the sale of malt by the illegal measure. The question arises upon a plea of set-off, but it is precisely the same as if it had occurred in an action brought to recover the value of goods sold by this illegal measure. All sales by measures varying from those directed by the statute (*a*) are illegal; and in furtherance of the intent of the statute the Courts have held, that such contracts are *void*, and cannot be enforced.

*Law v. Hodson* (*b*), *Little v. Poole* (*c*). In *Tyson v. Thomas* (*d*), it was held, that a contract for the sale of corn by this measure of the *hobbit* could not be enforced in an action at law. [Lord *Abinger*, C. B.—Suppose that the plaintiff had paid the defendant for the malt, could the former have recovered the money from him on the ground that the contract was *void*?] It must be admitted

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| (a) 5 Geo. 4, c. 74, amended by<br>6 Geo. 4, c. 12.<br>(b) 11 East, 300. | (c) 9 B. & C. 192.<br>(d) M'Cl. & Y. 119. |
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*Each of Pleas,* that he could not. [Lord *Abinger*, C. B.—Then is not  
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the settlement of accounts between the plaintiff and the defendant equivalent to a payment?] That argument, without doubt, presses strongly upon the defendant's case; but it has never been decided that such a settlement will have the effect of legalizing the contract. It has been decided that a bill of exchange, part of the consideration for which is the sale of spirituous liquors sold in less quantities than 20s., contrary to the provisions of the statute 24 Geo. 2, c. 40, s. 12, is void. *Scott v. Gillmore* (a). In that case the giving of a bill for the amount is a much more deliberate settlement of the account than that which was given in evidence here.

*Atcherley, Serjt., and Wolsby, contra,* were stopped by the Court.

**Lord ABINGER, C. B.**—The general proposition may be admitted, that a sale of this kind cannot be enforced by action, or taken advantage of on a plea of set-off; but the question here is, whether there has not been such a settlement of accounts between these parties as is equivalent to a payment. I think there has been such a settlement; and that the parties are in the same situation as if payment in cash had been made. The rule must, therefore, be made absolute.

The rest of the Court concurring,

Rule absolute.

(a) 3 Taunt. 226. See also *Gaitskill v. Greathead*, 1 D. & R. 359; but see *Spencer v. Smith*, 3 Campb. 9.

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JONES v. WATERS.

**CASE.** The first count of the declaration stated, that the borough of *Brecon*, otherwise *Brecknock*, is an ancient borough, and the burgesses thereof have been a body politic and corporate, and for divers years have been such body politic and corporate, by the name of the bailiff, aldermen, and burgesses of the borough of *Brecon*, to wit, in the county of *Brecknock*.

That the bailiff of the said borough for the time being, for divers years before the committing of the grievances by the said defendant hereinafter mentioned, hath been, and of right ought to have been, and still ought to be, and is, the lord of the manor of the said borough and the town of *Llywell*, to wit, in the county of *Brecknock*. That also, for all the time aforesaid, the said bailiff of the said borough for the time being, so being lord of the manor of the said borough and town of *Llywell*, hath been used and accustomed to appoint, and of right ought to have appointed, and still ought to appoint, such person as to him, the said bailiff, hath seemed fitting, to the office of town crier of the said borough and town of *Llywell*, to wit, in the county aforesaid.

That heretofore, to wit, on the first day of *May*, in the year of our Lord 1833, at *Brecon*, in the county aforesaid, *Lancelot Morgan*, Esquire, then and there being bailiff of the said borough, and lord of the manor of the said borough and town of *Llywell*, under his hand and seal, duly nominated and appointed the said plaintiff to the said office of town crier of the said borough and town of *Llywell*, to have and to hold the said office of town crier to him, the said plaintiff, for and during the term of three years, and for the execution of the said office; and then and there gave and granted unto the said plaintiff, all and every the fees, profits, and perquisites, belonging to the

A custom that the town crier of a corporate town shall have the exclusive privilege of proclaiming, by the sound of the bell, the sale of all goods brought into the borough to be sold by auction, is a good custom.

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said office of town crier within the said borough and town of *Llywell*. That by reason of the premises, the said plaintiff before, and at the time of the committing of the grievances by the said defendant hereinafter mentioned, was possessed of the said office of town crier for the term last aforesaid, to wit, in the county aforesaid, and that office, for a long space of time, to wit, one month next following the said appointment and grant, well and truly had exercised, and the wages, fees, and profits belonging to the aforesaid office of town crier for that time had and received, to wit, in the county aforesaid; yet the said defendant, contriving and intending to injure the said plaintiff, and to disturb him in the exercise of the said office of town crier, and to deprive the said plaintiff of the wages, fees, and profits belonging to the said office of town crier as aforesaid, to wit, on the 1st day of *June*, in the year of our Lord 1833, and on divers other days and times between that day and the commencement of this suit, at *Brecon*, in the county aforesaid, of his own wrong, and without any right or lawful authority, exercised the said office of town crier, and received and took divers fees and profits belonging to the said office of town crier within the said borough and town of *Llywell*, and then and there thereby hindered and disturbed the said plaintiff in and from exercising the said office of town crier within the said borough and town of *Llywell*, and prevented him from receiving the said last-mentioned fees and profits belonging to his said office of town crier as aforesaid. There were several other counts, in all of which the plaintiff claimed in right of his office. The defendant pleaded the general issue.

At the trial, before *Parke*, B., at the last *Summer Assizes* for the county of *Brecon*, it appeared that as far back as living memory went, there had been a person filling the office of town crier or bellman within the borough of *Brecon*, and that his duty or employment had been to attend the corporation upon certain days, and to make proclamation by the

sound of the bell, of certain matters; and, amongst others, of sales of goods, brought to be sold by auction within the limits of the borough. When making proclamation for the corporation, he was paid the sum of 1*s.*; and for proclamation of turnpike meetings, 2*s.*; but no certain sum was proved to be payable for the proclamation of sales by auction. It appeared that no one else proclaimed sales by auction. Evidence was given to shew, that the plaintiff had been in possession of the office. No evidence was offered on behalf of the defendant; for whom, it was contended, that there was no proof to go to the jury that the office was an ancient office, which had existed from time immemorial, or that the plaintiff had the exclusive right of proclaiming sales by the bell; but the learned Baron was of opinion that there was evidence to go to the jury upon both these points, and directed a verdict for the plaintiff, with liberty for the defendant to take the opinion of this Court, whether such an office as that claimed by the plaintiff could legally exist, and whether the right claimed of excluding others from proclaiming sales by bell within the borough, was good in law. The jury having found a verdict for the plaintiff, *J. Evans*, in the course of last term, obtained a rule pursuant to the permission of the learned Judge.

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*Maule*, and *E. V. Williams* and *Powell*, now shewed cause.—The first question is, whether the office of town crier of *Brecon*, as claimed in the declaration, can have a legal existence. That it has existed in point of fact, from time immemorial, is found by the verdict of the jury. That the office of town crier or bellman is a legal office appears from the case of *The King v. The Inhabitants of St. Nicholas, Hereford* (*a*), in which it was held to be a public annual office within the statute of 3 *W. & M.* c. 11. So, from *Hill v. Hawkes* (*b*), it appears, that the bailiff of *Lichfield* had

(*a*) 10 *B. & C.* 834.

(*b*) *Moore*, 835; *Roll. Ab. Customs*, (G.)

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been accustomed from time immemorial to appoint a person to the office of bellman. The next question is, whether the prescriptive right claimed by the plaintiff of excluding all others from proclaiming by the bell within the borough the sale of goods by auction, can be sustained in law. It is not necessary for the plaintiff to shew the origin or grounds of this particular custom. Many customs are good, founded upon reasons which have long since ceased. It is sufficient if, in their origin, they were reasonable and legitimate. If a legal commencement of the custom was possible, it will be presumed. *Drake v. Wiglesworth* (a), *Cock-sedge v. Fanshaw* (b). [Parke, B.—You contend that a by-law, to the effect of the custom in question, would be good.] Undoubtedly; and *a fortiori* a custom. The law of custom, as applicable to offices, is laid down in *Bacon's Abridgment* (c); and there are numerous cases there cited in which customs like the present have been held, notwithstanding the objection that they were in restraint of trade, to be legal. Thus in *Player v. Jones* (d), a by-law restraining the number of carts in the city of *London* was held to be good. So, in *Fawakerley v. Wiltshire* (e), a custom in the city of *London* that none but free porters should carry corn, &c., was sustained. The Chief Justice there says: “A custom to restrain trade in a particular place is good; and surely much more so, where the restraint is only from bodily labour in one instance, than where it prevents a man from exercising an art he has been long in learning. I think the custom is good, as it is a convenience to the public, and as there is an equivalent by the obligation the city

(a) Willes, 666.

(b) 1 Doug. 132. “The rule of law is, that wherever there is an immemorial usage, the Court must presume every thing possible which could give it a legal origin.”—Per Lord Mansfield, *ibid.*

(c) Offices (A.)

(d) 1 Ventr. 21; 1 Sid. 284, *nomine Player v. Jenkins.*  
(e) 1 Str. 462; 10 Mod. 338, S. C.; see also *Robinson v. Webb*, 1 Barn. K. B. 76.

is under to provide porters; if they do not, I am of opinion that an action will lie, as in the common case of a ferry."

Mr. Justice *Fortescue* says: "If this was an inconvenient custom, it would have been complained of before so long an enjoyment." The enjoyment there had been from the 18 *James* 1 to the 17 *Geo.* 1, but in the present case it has existed from time immemorial. In *Bosworth v. Hearne* (*a*) it was held, that a bye-law that no drayman or brewer's servant should be abroad in the streets with his cart or dray at certain periods was good; it appearing that there was a custom in the city for the regulation of carts. In that case the Court said, it was enough if the by-law did not appear unreasonable in itself. So, in *Bradnox's case* (*b*), the Court said, that it had been often resolved that custom may create a monopoly, as the case in the *Register* is, where the custom was that none should exercise the trade of a dyer in *Rippon*, without the archbishop of *York's* license (*c*). There is also another class of cases which shews, that restrictions of the same nature as that now in question are not contrary to law. It has been held in many cases, that a custom for the servants and inhabitants of a certain district to grind their corn at a certain mill, or to bake their bread at a certain bakehouse, may be sustained in law. In *Mosley v. Walker* (*d*), the exclusive right of Sir *Oswald Mosley*, as lord of the manor of *Manchester*, to exclude all persons from selling in their own houses all such commodities as were usually sold in the market, was established. So, it has been held to be a good custom for all the householders and occupiers of dwelling-houses in the parish of *A.* to grind at the plaintiff's mill all their corn which shall be used by them within the parish, although the inhabitants are not tenants (*e*). Nor can it be

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(*a*) 2 Str. 1085; Rep. temp.  
Hardw. 405; Andr. 91, S. C.

(*d*) 7 B. & C. 40; 9 D. & R. 863.

(*b*) 1 Vent. 195.

(*e*) 1 Roll. Ab. 559, pl. 4; 2

(*c*) Reg. Br. 186.

Saund. 117, n. See *Richardson v.*

*Walker*, 2 B. & C. 827; 4 D. & R. 498.

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That it is neither inconvenient nor unreasonable may be inferred from the length of time during which it has been suffered to exist without being questioned. Many customs productive of much more inconvenience, as, for instance, the office of hog-ringer in a parish, have been considered legal. Had the custom been unreasonable, there was nothing to prevent its being questioned; and yet, until the present action, its legality has been unimpeached.

*John Evans and James, contrâ.*—Before entering upon the inquiry, whether such an office as that claimed by the plaintiff can legally exist, or whether a custom to the effect of that set up in the declaration is legal, there is a preliminary question to be disposed of; *viz.* whether in fact any *office* whatever, in the legal sense of the term, was shewn in this case to have existed. That the plaintiff exercised the *employment* of bellman was proved; but there is a clear distinction in law between an *employment* and an *office*. Throughout all the counts of the declaration, the plaintiff claims in respect of an office; and unless he proves that a legal office existed, he must fail in this action. There are several cases in which the distinction between an office and a mere employment has been taken. In *Field v. Boethsby* (*a*), it is said by *Glynn*, C. J., “ Mes pur explane mon diversity parenter un office et un employment, jeo die, que coment chescun office soit un employment, uncore e converso chescun employment n'est un office: come si jeo grant al, un pur make mon hay, ou pour arer mon terre, ou pour heard mon flock, ceux sont employments, et differ del esteant steward de mon manor, &c. queux sont offices (*b*).” The distinction between an office and an employment was likewise taken in the case

(*a*) 2 Sid. 140.

(*b*) See Bac. Abr. Office (A.)

of *Ripon v. Streater* (*a*), which was an action brought to try the validity of the king's patent for the exclusive printing of law books; and there the House of Lords held, that it was not the grant of an office, but rather of an employment. In *Lee v. Drake* (*b*), which was an action for disturbing the plaintiff in his office of parish clerk, it was objected, that it was rather a service or employment than an office; but no decision seems to have been come to on the point. In *Boyter v. Dodsworth* (*c*), it was held, that an action for money had and received would not lie to recover the perquisites of an office, unless such perquisites were known and accustomed fees. Hence Lord *Kenyon* says, " If there had been costs and fees annexed to the discharge of certain duties belonging to the office, and the defendant had received them, an assize would have lain." This shews, that to constitute an office in law, there ought to be both certain duties and certain fees attached to it, neither of which is the case here (*d*). But admitting that this is an office, and not a mere employment, the custom attempted to be supported is bad, as being in restraint of trade, unreasonable, and inconvenient. It is bad as being in restraint of trade, because it not only prevents others from exercising a lawful calling, by which they might maintain themselves, but it restrains those who come to the borough of *Brecon*, for the purpose of selling their

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(*a*) Bac. Ab. Prerog. Grant, (5) vol. 5, p. 595, 6th ed.; Skin. 234; 2 Show. 260; 10 Mod. 106.

(*b*) 2 Salk. 468.

(*c*) 6 T. R. 681.

(*d*) It is said that the word *officium* principally implies a duty, and in the next place, the charge of such duty; and that it is a rule, that where one man has to do with another man's affairs against his

will, and without his leave, it is an office, and he who is in it is an officer. Bac. Abr. tit. Office (A) citing *Dr. Burrel's case*, Carth. 478, 5 Mod. 431. S. C. The office of searcher in the customs was said to be rather an employment than an office. *R. v. Kemp*, Carth. 352. Vin. Ab. Office (B); but see 14 Ric. 2, c. 10.

*Exch. of Pleas.* goods, from giving notice of their sales in as full and public a manner as they might otherwise do. The cases which have been referred to, in order to shew that bye-laws and customs in restraint of trade have been held good, do not prove that position. These were cases of bye-laws for the *regulation* and not in *restraint* of trade (*a*): as in the instance of the by-laws to regulate the number of carts in *London*, and to limit the number of free porters. The object of those by-laws was the public convenience, and the furtherance of the interests of trade in general. Had they been in restraint of trade, they would have been bad. [Parke, B.—Bye-laws in restraint of trade are good, if made in pursuance of an ancient custom (*b*). Such by-laws exist in many places, as in *London* and *York*. The legality of such bye-laws was questioned in the case of *The Mayor of York v. Welbank* (*c*); but they were held to be good.] The case of *London* is very different. In *London* there are many guilds, consisting of a great number of individuals, and the public at large are not injured by the tradesmen of *London* being compelled to become free of these companies; but here a monopoly is claimed in the person of a single individual. [Parke, B.—In *York*, there are no guilds; there, none but free-men are allowed to exercise a trade.] That case also is distinguishable from the present. There a sufficient number of persons exist in the body to carry on the trade of the city; but here there is only a single individual; and if he should become incapable of performing the duties of his office, what is the remedy to which the public are to resort? In those cases, the obligation only exists in regard

(*a*) That bye-laws, excluding all but certain persons from carrying on a trade, are in *restraint* of trade, see *Harrison v. Godman*, 1 Burr. 12; *Clarke v. Compton*, 7 D. & K. 597; *Clark v. Le Cren*, 9 B. & C. 52.

(*c*) 4 B. & A. 438.

(*b*) See *R. v. Harrison*, 3 Burr.

to inhabitants and residents, but here the claim is against strangers. [Parke, B.—It is only claimed to be enforced against such persons as come into the borough for the purpose of having their goods sold by auction.] *Player v. Jones*, and *Faxakerley v. Wiltshire*, proceeded upon the grounds, that the matters restrained were nuisances. Fortescue, J., in the latter case, says, “The case of carts was allowed to prevent nuisances, and we may put this upon the same foot.” *Bosworth v. Herne* appears to have been decided upon the same principle. Lord Hardwicke there says, “Where the subject matter of a bye-law is the prevention of nuisances, the consideration must be upon the convenience in general, taking in the Crown, the party, and the people (a);” and the decision there is likewise placed, according to the report in *Strange* (b), on the ground of its being a *regulation* of trade. With regard to the cases of mills and bake-houses, they depend upon the relation between the lord and his tenants. *The Archbishop of York's case* was held to be good, because the Archbishop had it *ratione dominii et tenuræ* (c); and although the obligation may not now be confined to tenants, yet, doubtless, it was originally connected with tenure. In the case of *Sir George Farmer v. Brooke* (d), the plaintiff declared, that by custom he and his ancestors had a bake-house in the town of B. to bake white bread and household bread, and that he had served all the town with bread, and that no other could use the trade without his license, and that the defendant had used the trade without his license; but it was adjudged that the action did not lie: “God forbid,” it was said, “that bread, and the baking of it, should be restrained to any special person, especially in a market town.” Independently of

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(a) Cases temp. Hardw. 408.

Cro. Eliz. 203; 8 Co. 125, b. S. C.

(b) 2 Str. 1087.

The reporters differ as to the judgment in this case.

(c) See Owen, 67.

(d) Owen, 67; 1 Leon. 142;

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the objection that the custom is bad as being in restraint of trade, it is bad as being unreasonable. It is unreasonable in the first place, because there is no consideration. In *The Bellman of Lichfield's case* (*a*), there was a consideration for the restriction, the party being bound to keep the market clean; but here there is no adequate compensation. It is unreasonable, also, because there are no defined duties attached to the office, and because there are no certain fees payable to the officer. What duty is the plaintiff bound to perform? Is he to make proclamation once or ten times, at what hours, and in what streets? What would constitute an intrusion into his office? May another person proclaim sales by the sound of a trumpet or of a drum, or by the voice? Or does the claim extend to prohibit every notice of a sale by whatever means conveyed, as by exhibiting a placard, or sending circulars? These considerations shew that the custom is void, on account of uncertainty. Then what remuneration is he to receive? May he make his own claim, and refuse to proclaim a sale until his demand is satisfied? Neither his duties nor the compensation for them are defined. Again, the custom is bad on account of the inconvenience which it occasions. Suppose the person appointed to the office should not be qualified to perform its duties, that his voice is weak, or that he becomes incapable by reason of age or infirmity. Even should he wilfully refuse to perform his duty, what is the remedy of the party, or how is the officer to be removed (*b*)? Another great inconvenience in the custom under which the plaintiff claims is

(*a*) *Hill v. Hawkes, Moor*, 835.

(*b*) In *Fazakerley v. Wiltshire*, 1 Str. 468, the Chief Justice says, "The custom is a convenience to the public, and there is an equivalent by the obligation the city is under to provide porters. If they

do not, I am opinion, that an action will lie, as in the common case of a ferry; neither is the merchant obliged to rely on an action only, for he certainly may employ whom he pleases, if the free porters do not attend."

that it makes no provision whatever for those changes which the course of time and the alteration in the state of society may require. Suppose the borough to have been situated in *Lancashire*, and to have grown up, like *Manchester*, into a large and populous commercial town; still this single officer must have enjoyed the monopoly of advertising sales, there being no power of appointing others. This is a case of the first impression; and it is a strong argument against the plaintiff's claim, that there are no traces of any action of this kind having been brought. [Parke, B.—That actions resembling the present have been seldom brought, may be explained in this way. The right is in general vested in a class of persons, all of whom, as in the case of the *Dippers of Tunbridge Wells* (a), being jointly interested in any intrusion upon their rights, would be required to join in an action. This would render such a suit highly inconvenient. Lord Abinger, C. B.—The case has been extremely well argued on both sides, and we shall take time to consider our judgment.]

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*Cur. adv. vult.*

**Lord ABINGER, C. B.**, now delivered the judgment of the Court.—This is an action brought by the bellman of *Brecon* to enforce an exclusive privilege, claimed by him, of proclaiming by the sound of the bell all sales by auction of goods which take place within the borough of *Brecon*. The case was very fully argued; but the only point to be decided is this, whether the custom under which the plaintiff claims is a good custom in law. The plaintiff states in his declaration, that he was possessed of the office of town crier, and that the defendant disturbed him in that possession. The particular duties of the office were matter of evidence, and evidence was given, and the jury accordingly so found, that it was the exclusive privilege of the town crier, ap-

(a) *Weller v. Baker*, 2 Wils. 414.

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pointed by the corporation, to make public proclamation of sales by auction, and that the defendant had infringed that privilege. No objection is taken to the evidence upon which that verdict proceeded, and therefore the only point is, whether the custom is good in law. After a consideration of the arguments on both sides, it appears to us, that there are no grounds upon which we can say that such a custom is necessarily bad. It may have had a good commencement; and, existing probably long before the art of printing was known, must have been formerly a much greater convenience to the public than at present. There is nothing to prevent the corporation of *Brecon* from appointing a town crier; and we cannot say, that a custom giving him the exclusive privilege of proclaiming, by the sound of the bell, all sales by auction within the borough, is not maintainable in law.

Rule discharged.



CLARKE and Another, Assignees of SUTTON, a Bankrupt,  
*v.* NICHOLSON, Esq.

Where, after an act of bankruptcy, a sheriff seizes and sells goods, in trover by the assignees, the jury may deduct, in their estimate of the damages, the expenses of the sale.

**T**ROVER for household furniture, &c. Plea—that defendant brings into Court the sum of 24*l.* 15*s.*, ready to be paid to the plaintiffs as assignees, and that the plaintiffs have not sustained damages to a greater amount, &c. Replication—that the plaintiffs have sustained damages to a greater amount, &c. At the trial before *Parke*, B., at the sittings at *Guildhall*, after last term, it appeared that the bankrupt had been a builder, and had committed an act of bankruptcy; after which the defendant, then being sheriff of *Surrey*, took in execution under a *fi. fa.*, the household furniture, implements, and stock in trade of the bankrupt, and sold them. Subsequently

to the sale, a fiat issued ; and this action was brought to recover the amount of the proceeds of the goods received by the sheriff. The latter paid into Court the sum of £41. 15s., that being the net proceeds, after deducting the expenses of the sale. It was objected, on behalf of the plaintiffs, that the sheriff was not entitled to make this deduction ; but the learned Judge told the jury, that, as the plaintiffs themselves would have been obliged to sell the goods, he thought that the expenses of the sale might be deducted from the plaintiffs' claim. The jury having found a verdict for the defendant—

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*R. V. Richards* now moved for a new trial, on the ground of misdirection. The sheriff is a wrong doer ; he has tortiously seized and sold the goods of the plaintiffs, and he cannot claim, as a matter of right, to retain the expenses of that tortious sale. The question is of importance in this case, for the costs depend upon its decision. The sheriff was not the agent of the plaintiffs for the sale of the goods, and they are not liable, therefore, for any expenses incurred by him in such sale ; and the learned Judge was not correct in telling the jury that they might, if they thought proper, deduct those expenses from the damages. [Lord *Abinger*, C. B.—It does not appear that it was so laid down to the jury as matter of law.] If a sheriff is entitled to deduct the expenses of sale, in cases like the present, it may be a cause of great expense ; as, for instance, where goods in three different counties have been seized. The assignees might sell all the goods at one and the same time ; if the sheriff may retain, they may be charged with the expenses of three sales. In *Glasspoole v. Young* (a), it was held that the plaintiff was entitled to recover the value of the goods seized, though that value exceeded the price for which

(a) 9 B. & C. 696 ; 4 Man. & Ry. 533, S. C.

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they were sold. [*Gurney*, B.—In that case the plaintiff never contemplated a sale.] If the plaintiffs are entitled to recover the value of the goods, the expenses must not be deducted, for otherwise they would not obtain the value.

**Lord ABINGER, C. B.**—It is not necessary for the Court to lay down a rule that a sheriff, under circumstances like those in the present case, is entitled to deduct the expenses of the sale. It is sufficient to say, that, this being an action for damages, the jury are at liberty, in assessing the damages, to make that deduction in favour of the sheriff. On the other hand, if there were several sales, in several counties, the jury might take that fact into their consideration. The assignees in this case must have incurred the expense of a sale, and there is, consequently, no reason for disturbing the verdict.

Rule refused.

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#### THE KING v. the MAYOR, JURATS, and COMMONALTY of the Town and Port of DOVER.

*Revenue.*

By a charter of *Edw. 4*, the crown granted to the corporation of *Dover* “all penalties forfeited and to be forfeited, &c. of all and every the Barons, &c. in whatsoever Courts the same Barons, &c.

should happen to be adjudged.” By a charter of *Charles 2*, “all fines, forfeitures, &c. in the Courts aforesaid arising, &c.,” were also granted to the corporation:—*Held*, that under neither of these charters did a forfeited recognizance to appear to answer a charge of misdemeanor pass to the corporation.

**JOHN MUIRHEAD**, being charged with a misdemeanor before his Majesty's justices of the peace for the town and port of *Dover*, was admitted to bail, himself in a recognizance of 300*l.*, and two sureties in 150*l.* each. *Muirhead* having failed to appear according to the terms of the recognizances, they became forfeited, and were estreated into the *Exchequer*. To these forfeitures the corporation

of *Dover* made claim, and proceedings were instituted similar to those in the case of *The King v. The Mayor of London* (a). The claim set forth a charter made by *Edw. 4*, bearing date at *Westminster*, the 23rd day of *March*, in the fifth year of his reign, which contained, amongst other things (b), the following grant:—"That the corporation and their successors might have all and all manner of fines for trespasses, offences, misprisions, extortions, negligences, ignorances, conspiracies, concealments, regratings, forestallings, maintenances, ambidextries, champerties, falsities, deceits, contempts, and other offences whatsoever; and also fines for license of concords, and all amerciaments, redemptions, issues, and *penalties forfeited* and *to be forfeited*, year, day, waste, strepe, and all things which to his said Majesty or his heirs might appertain, of such year, day, waste, and strepe of all and every the barons, and other the resciants aforesaid, their heirs and successors wheresoever, as well within the parts and members aforesaid as without, *in whatsoever Courts of his said Majesty and his heirs the same barons and other resciants, should happen to be adjudged* to make such fines, and to be amerced and forfeit such issues, penalties, year, day, waste, strepe, and forfeitures, which fines, amerciaments, redemptions, issues, penalties, year, day, waste, strepe, and forfeitures, might appertain to his said Majesty and his heirs, if the same had not been granted to the aforesaid barons and good men, and their successors; so that the said mayor and jurats, bailiff and jurats, and also jurats in every port, and member of the ports, and members aforesaid, as is aforesaid chosen by themselves or their ministers, such fines, amerciaments, redemptions, issues, penalties, and forfeitures, and all things which to his said Majesty, his heirs and successors, might

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(a) *Ante*, p. 1.

(b) The other parts of the charters essential to the case are re-

ferred to in the judgment of the Court.

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appertain, of the year, day, waste, strepe and forfeitures aforesaid, might levy, perceive, and have, to the common profit and use of the said barons, and their heirs and successors, without impediment to his said Majesty or his heirs, his justices or their bailiffs, or his ministers whatsoever."

By the charter of *Charles 2*, it was granted that the corporation and their successors "might have and perceive, and should have and perceive, to their proper use and commodity, respectively, all and singular fines, amerciaments, redemptions, issues, *forfeitures*, and other profits whatsoever, of *and in the Courts* aforesaid, respectively growing, arising, happening, or contingent; and all and singular those fines, *forfeitures*, redemptions, amerciaments, issues, forfeitures, and profits, to their own use and commodity, respectively, from time to time, by their ministers, to levy, perceive, seize, and retain, by action or actions of debt, or such other suits, actions, means, ways, and process in any Court or Courts of record within the Cinque Ports, or ancient towns aforesaid, or members of the same aforesaid, or any of them, to be had and prosecuted, by which such fines, amerciaments, redemptions, issues, forfeitures, and profits, in any Court of him his said Majesty, his heirs and successors, through his whole kingdom of *England* were wont or might be levied, perceived, or recovered, without impediment of him, his heirs, or successors, or any of his ministers whatsoever."

The replication to this claim set forth the recognizances, and the condition for the appearance of *John Muirhead*. It then averred that *Muirhead* did not appear in pursuance thereof, and that the recognizances thereupon remained and were in full force; that thereupon *Muirhead* and his sureties became and were indebted to the king in the sums, &c., making together the sum of 600*l.*, which had been estreated, and was owing to the Crown, by virtue of the recognizances. To this replication the mayor, jurats, and commonalty of *Dover* demurred generally.

*Jervis*, for the mayor, jurats, and commonalty of *Dover*.—The question raised by this demurrer for the decision of the Court is, whether a recognizance entered into before justices of the peace for the town and port of *Dover*, for the appearance of a party upon a charge of misdemeanor, to be tried at the sessions there, being forfeited by the non-appearance of the party, passed to the corporation, by virtue of both or either of the charters set forth in the claim put upon the record. For the corporation, it is contended, that the words of either charter are sufficient to pass the forfeitures; but they place their chief reliance upon the clause in the charter of *Charles 2.* With regard to the power of the Crown to make such a grant, the authorities are numerous and conclusive, and may be found collected in the Digests. *Com. Dig., Grant and Prerogative*; 17 *Vin. Ab. Prerog.* 91. So the King may grant a chose in action, *Com. Dig. Grant* (G. 1); or a thing not in esse, 17 *Vin. Ab.* 91. [Wightman.—The power of the Crown to make such a grant will not be disputed.] Then the question is, whether the words of the charters, taken in connexion with the context, are sufficient to pass forfeited recognizances. The words of the later charter must be understood as passing something more than those of the earlier charter. The King may grant issues and amerciaments by general words, 17 *Vin. Ab.* 136, where the following case from the Year Book of *Hen. 6*, 27, is cited:—"The King granted to the Duchess of *E.*, *insulam de B. et castrum cum pertinentiis, habendum, &c., simul cum omnibus exitibus, finibus, amerciamentis proficuis omnium gentium, tenentium, residentium, et non-residentium, adocationibus, wardis, et reliquis, wreckis maris, et aliis de et infra insulam prædictam in quibuscunque curiis nostris emergentibus*;" and the sheriff demanded allowance upon his account of certain issues forfeited in Banco at *Westminster*. And the best opinion there was, that he shall not have allowance of them, nor the duchess shall not

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have them; for those words, *emergentibus infra insulam*, shall be intended of such *fines*, &c. which are forfeited in any court in the isle, but not of fines and amerciaments forfeited at *Westminster* or elsewhere, extra the isle; but the case is not ruled." The definitions of the word "forfeiture" support the construction put upon the charters by the corporation. In *Cowell's Interpreter* it is said, "Forfeiture, *forisfactura*, cometh of the French word *forfaict*, *id est, scelus*; but in our language signifieth rather the effect of transgressing a penal law, than the transgression itself: as forfeiture of escheats, 25 *Edw. 3*, c. 2, *stat. de Prodictionibus*. How goods forfeited and goods confiscate differ, see *Stamf. Pl. Cor. fol. 186*, where those seem forfeited that have a known owner, having committed any thing whereby he hath lost his goods; and those confiscate, that are disavowed by an offender as not his own, and claimed by any other: but we may rather say that forfeiture is more general, and confiscation more particular to such as forfeit only to the King's *Exchequer*. Read the whole chapter, lib. 3, c. 24. Full forfeiture, *plena forisfactura*, otherwise called *plena vita*, is forfeiture of life and member, and all else that a man hath. *Manwood*, c. 9. The canonists use also this word—*forisfacturæ sunt pecuniaræ pænae delinquentium*." In *Ducange, voce "Forisfactura,"* the following definition is given:—" *Forisfactura, multa vel emenda ob forisfactum seu delictum, amende des forfactures, apud Froissart, vol. 1, c. 116. Leges Edwardi Confessoris, c. 36. Inveniant plegios tales qui possunt reddere forisfacturam, id est were (a) suum nisi possint disrationari. Forisfactura, eodem significatu, litteræ Philippi, Fr. Regis, anno 1290, inter Anec. Marten, tom. 1, col. 1234. Emendam vero seu forisfacturam quam*

(a) *Capitis estimatio, sive premium quo vita cujusque apud Anglo-Saxones pro vario suo*

*statu, ordine, et conditione censebatur. Lexicon Saxon.*

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*petebamus occasione homagii hactenus per eundem nobis non emensi . . . eidem (Comiti Hannonie) remisimus.*" *Carpentier*, in his supplement to *Ducange*, says, " *Forfaitura mulcta vel emenda ob forisfactum, Lit. Ricardi Regis Angl., tom. 5, Ordinal. Reg. Franc. p. 317. Prohibemus ne aliquis eos inde desturbet super forfaituram decem librarum Turon.*" *Johnson's* definition is, " The thing forfeited, a mulct, a fine." That the word " *forfeited*" is properly applicable to the case of recognizances appears from the stat. 22 & 23 Car. 2, c. 22, where the term *forfeited* is applied to recognizances (a). That act is intitled, " An Act for the better and more certain recovery of fines and forfeitures due to his Majesty." The preamble of the statute only mentions fines, issues, amerciaments, and *other forfeitures*, without specifying recognizances, but it must be intended to include recognizances, which are specifically mentioned in the 5th and 9th sections of the act. In the 10th section recognizances are omitted in words, but included, as in the preamble, under the general word " *forfeitures*." This, therefore, is a legislative exposition of the word *forfeiture*, and shews that it is applicable to and includes forfeited recognizances. If there be any doubt with regard to the construction of these charters, the Court will lean in favour of the grantees; for the grants are made " of the King's special grace, certain knowledge, and mere motion." The effect of these words is explained in the case of *Alton Woods* (b), where it is said, " This grant is made *de gratia speciali* (which implies bounty), and *ex certa scientia* (which imports science and knowledge), and *ex mero motu* (which manifests that it was not made upon the suggestion or suit of the party); but all these are not of any effect or opera-

(a) So the preamble of the 3 Geo. 4, c. 46, recites that great delays occur in the return of fines, issues, amerciaments, and *forfeited recognizances*; and the same

terms are used in other parts of that statute. See *Ex parte Pellow*, M'Clel. 111; *Rex v. Han-*

*kins*, M'Clel. & Y. 27.

(b) 1 Rep. 51 b.

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tion if the King be deceived." There is no pretence here for saying that the King was deceived in his grant. In the same case it is said (*a*), "As to the rule put by *Starkey*, that the King's patents shall be taken in such sense and to such intent as that they shall be good, and as to the said rule likewise taken, that the King's patent, *ex certa scientia*, *ex mero motu*, shall be taken as strong against the King as if a common person had made the grant, it was answered that there is another rule in law, that when the King is deceived in his grant, the grant is void, and that the King's letters patent shall be construed *secundum intentionem domini regis, et non in deceptionem domini regis*, as *Brian* saith, 1 *H.* 7, 13 *a*. So, the best exposition is, to make all these rules agree together; and therefore both the said rules put by the other party are true, with this limitation, *viz.* unless the King be deceived." In the *Earl of Rutland's case* (*b*), the rule for the construction of the King's grants is thus laid down:—"His grant ought to be construed *secundum intentionem regis et non in deceptionem regis*; and when a literal and strict construction is made to make his grant void, it sounds in deceit of the King, and is a great indignity to him, *propter apices juris*, to make his charter under the great seal of things which he may lawfully grant void and of non-effect, *quid apices juris non sunt jura*." The case of the claimants lies within a small compass. They say that the King has power to make a grant of forfeited recognizances; that in the grant to the corporation of *Dover* he has not been deceived; and that under the word *forfeitures* in that grant forfeited recognizances pass.

*Wightman*, for the Crown.—It is not necessary to dispute the propositions of law which have been advanced on the other side, or to deny the correctness of the definitions

(*a*) P. 46 *a.*

(*b*) 8 Rep. 112.

of the word "forfeiture" which have been cited. The question simply is, whether a *recognizance* of this nature, the condition of which has not been complied with, is to be regarded as a *forfeiture*. It was for the purpose of raising this question that the *recognizances* were set out in the replication. A *recognizance* is the acknowledgment of a debt due to the King, defeasible upon the happening of a certain event, *viz.* the appearance of the party in Court, pursuant to the terms of the condition. In this respect a *recognizance* resembles a bond in its nature, and the argument urged on the other side would go the length of shewing that all the custom-house bonds given to the King in the Cinque Ports would, when the conditions are broken, pass to the corporation under this grant. By a *recognizance* a debt is created in the first instance. The party acknowledges a personal debt to the Crown, and it is by the performance of the condition of the *recognizance* only that it ceases to be a debt. It is therefore inaccurate to say that a *recognizance* becomes *forfeited*. It is not a legal term when applied to a *recognizance* (*a*). The correct expression is, that the condition of the *recognizance* has not been performed. Should the Crown put the *recognizance* in suit, the party must make his defence by pleading, according to the condition, that he duly appeared, &c. If *forfeiture* means, according to the authority of *Cowell*, "the effect of transgressing a penal law," it will not be intended that the Crown meant to use the word in another sense, and to grant its interest in instruments, the conditions of which have not been performed. In grants of the Crown, all doubtful expressions are to be construed in favour of the King, as in the case of *The King v. Sutton* (*b*), where a grant of the goods of felons was held not to pass the goods of a felon of him-

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(*a*) Vide ante, p. 731, (n).      1 Ventr. 32; 2 Keb. 526, 533,  
 (*b*) 1 Saund. 269; 1 Sid. 420; S. C.; 2 Roll. Ab. 194, C. pl. 2.

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self. [Parke, B.—The corporation cannot claim under the words “penalties forfeited” in the charter of Edward 4, because those are such as only the Barons shall be adjudged to make.] This is not the case of a forfeiture in Court. There is no judgment upon the recognizance. It must be put in suit. Suppose the condition to have been simply that the party should pay a certain sum of money to the prosecutor, at the castle of Dover, would such a recognizance as that pass? Yet it is equally forfeited. There is no locality in the forfeiture of a recognizance. It is forfeited to the King every where, and may be put in suit by him any where. The forfeitures alluded to in the charter of Charles 2 are forfeitures for offences, and not recognizances, which merely create a debt or duty.

*Jervis* was heard in reply.

*Cur. adv. vult.*

PARKE, B., now delivered the judgment of the Court. After stating the pleadings, the learned Judge said—The only question arising on these pleadings is, whether the recognizance, which was in ordinary parlance forfeited by the non-appearance of John Muirhead at the sessions, was comprised within the grant of the Crown by the charter of Edw. 4 or Car. 2 to the Cinque Ports, of which Dover is one; and we are of opinion that it was not. Both the charters are stated to be of the “more abundant special grace, certain knowledge, and mere motion of the King;” but whatever the precise effect of these words may be, upon the construction of charters, it is clear that they do not operate to make those things pass to the grantee for which there are not apt and proper words of description in the grant; instances of which are to be found in the *Case of Mines* (a), in which case the word “mines” was held not to pass a royal mine; and in *Dyer* (b), where the

(a) *Plowd.* 337.

(b) P. 300.

grant of the advowson was decided not to convey the present avoidance; and in the case of *The King v. Capper* (a), it was laid down that the words "*ex mero motu et certa scientia*" do not reduce a royal grant to the same standard of construction as the grant of a subject, and bring it within the principle that it is to be taken strongly against the grantor. Upon referring to the charters in question we cannot find any words apt and proper to convey the King's interest in recognizances of this kind, nor indeed any which would induce us to think that they were intended to be granted; certainly none which, in the ordinary mode of construction of a royal grant, could have that effect. These recognizances are nothing more than debts of record to the Crown, with a defeazance in a particular event; and on the happening of that event, they become absolute debts. The words relied upon by the claimants as conveying such debts in the charter of *Edw. 4* are, "all amerciaments, issues, and penalties forfeited;" but the context clearly shews, that only such *penalties* are meant to be granted as are imposed by a judgment of some Court; for the words are, "in whatsoever Courts of his said Majesty and his heirs the same barons and resiants should happen to be adjudged to make such fines, and to be amerced, and forfeit such issues, penalties, &c.;" but in this case there is no judgment of any Court by which a recognizance is *adjudged* to be forfeited. Indeed, little reliance was placed on this charter by the learned counsel for the claimants. The other charter is that of *Charles 2*, which is a charter of confirmation and grant of new privileges to the Cinque Ports. It establishes a civil court of record in each Cinque Port, and grants fines, amerciaments, redemptions, issues, *forfeitures*, and other profits whatsoever of and in those Courts, growing, arising, happening, or contingent. It then appoints corporate justices of the peace and justices

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to hear and determine all felonies, &c.; and those delinquents and every of them, for their crimes, by fines, ransoms, amerciaments, *forfeitures*, and otherwise according to law, to chastise and punish. It then appoints corporate justices of gaol delivery, and grants to each corporation all and all manner of fines, issues, redemptions, amerciaments, *forfeitures*, and profits whatsoever, before the aforesaid justices (that is, the justices of the peace, oyer and terminer, and gaol delivery), from time to time for ever thereafter to be assessed, forfeited, adjudged, growing, happening, or arising. It is contended that the recognizance in question is comprised under the term "forfeiture" in the latter charter. But the proper signification of that term, as appears from the citations in the argument from *Cowell's Interpreter* and *Ducange*, is, a "mult or fine—a punishment for an offence;" and it is quite clear that it is used in that sense in the immediately preceding part of the charter, when the justices are empowered to punish delinquents by fines, ransoms, amerciaments, and *forfeitures*. The term "forfeit" is indeed ordinarily applied to the penalty of a bond with a condition, or to an estate held on condition; but the penalty of the bond when it is forfeited, or the estate itself, is never termed "a forfeiture," even in common parlance; and it is therefore impossible to suppose that a recognizance with a condition broken, could be intended to be described by such a term in a legal instrument. It is very true that in a statute, 22 & 23 Car. 2, c. 22, the term "forfeiture" is used in the title of the act as a general term; and the act itself, after enumerating fines, issues, amerciaments, forfeited recognizances, sum and sums of money paid or to be paid in lieu or satisfaction of them, speaks of all "*other forfeitures*"; but there the context clearly explains the meaning of the term "*forfeitures*." In the present case, the context affords no such aid; and in its proper sense, especially in a grant from the Crown, we are of opinion that it does not apply

to a debt of record rendered indefeasible by non-compliance with the condition. Our judgment must therefore be for the Crown.

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LEVI v. DUNCOMBE.

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**H**UMFREY and *Hughes* shewed cause against a rule which had been obtained calling upon the plaintiff to shew cause why an attachment should not issue against him for not delivering his bill of costs pursuant to a Judge's order, which order had been made a rule of Court. They contended, that, without merits, the rule must be discharged, as it had not been personally served upon the plaintiff, but only upon his clerk. [Lord *Abinger*, C. B.—There must be personal service of the order which has been made a rule of Court, and the disobedience to which constitutes the contempt; but that is very different from the service of a rule *nisi*, which is only for the purpose of bringing the party into Court in order to explain his disobedience; and if he appears upon that rule, it is immaterial whether or not there has been a personal service of it.] Before a party can be brought into contempt, he must be personally served. [Lord *Abinger*, C. B.—The contempt is not in disobeying the rule to shew cause: it had been already incurred.] A personal service is necessary under the rule of *H. T. 2 Will. 4*, s. 51, which directs that it shall not be necessary to the regular service of a rule that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment; and in *Weston v. Faulkener* (*a*), it is laid down that the service of all processes throughout, having for their object to bring a party into contempt, must be personally served, unless specially otherwise ordered.

Where a rule nisi issues to shew cause why an attachment should not issue for not obeying a Judge's order which has been made a rule of Court, and the rule nisi is not personally served, but the party appears upon it and objects to the want of personal service, such appearance waives the necessity of a personal service.

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*Thesiger and Butt, contrà, were stopped by the Court.*

**Lord ABINGER, C. B.**—This is not a proceeding having for its object the bringing the party into contempt. It is a rule calling upon him to shew cause why he should not be punished for a contempt already committed. But even if it had been necessary that the rule should be personally served, the party having chosen to come into Court, the necessity for personal service is waived. The principle is perfectly familiar to every one who has been a reasonable time in *Westminster Hall*, that the effect of a party appearing, who has not been regularly served, is the same as if the service had been regular. The instances are numerous, both in the case of convictions and of civil proceedings. The appearance operates as a waiver of the irregularity.

*Humfrey* then proceeded to shew cause upon the merits. But the rule was ultimately made absolute with costs, the attachment not to be issued for one month.

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**ASHTON and Another, Executors, &c. v. POYNTER.**

Where an executor sues upon a promise made to himself, and there is a verdict against him, the defendant is not deprived of his costs by the statute 3 & 4 Will. 4, c. 42, s. 31.

**T**HIS was an application made on behalf of the plaintiffs for the Master to review his taxation of costs. The first, second, and third counts of the declaration stated causes of action arising in the time of the testator; the last count was upon an account stated with the plaintiffs personally. The cause having been referred, the arbitrator, in pursuance of the power reserved to him, awarded that a verdict should be entered for the defendant; and the Master, in taxation, allowed him all the costs of the cause. *Kelly* having obtained a rule to shew cause why the Master should not review his taxation—

*Alexander shewed cause.*—The defendant is willing to abandon his claim to costs upon the counts stating a cause of action with the testator, but he insists that he is entitled to the costs upon the last issue found for him. It is clear that previously to the statute for the further amendment of the law (*a*) he was so entitled. This point has been decided in various recent cases. In *Dowbiggin v. Harrison* (*b*), it was held that where the plaintiff sued as administratrix, and declared on promises to the intestate, and also upon an account stated with her as administratrix, of monies due to her in that character, the defendant, after a nonsuit, was entitled to costs. And where the count on the account stated alleged that the account was stated with the plaintiff concerning money due to the intestate, the Court decided the same way. *Jobson v. Forster* (*c*). The only question then is, whether the statute 3 & 4 Will. 4, c. 42, s. 31, has deprived the defendant of his right to costs. That statute speaks of every action brought by any executor or administrator *in right of the testator or intestate*; but being an affirmative enactment, it does not affect the law as it stood with regard to actions brought by an executor or administrator *not* in right of his testator or intestate. It is a rule that affirmative statutes do not by implication repeal prior affirmative statutes; *Dr. Forster's case* (*d*); and this statute cannot

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(*a*) Stat. 3 & 4 Will. 4, c. 42, s. 31.—“That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the said superior Courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases

in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.”

(*b*) 9 B. & C. 666; 4 Man. & Ry. 622, S. C.

(*c*) 1 B. & Ad. 6. See also *Stater v. Lawson*, 1 B. & Ad. 893.

(*d*) 11 Rep. 63.

*Exch. of Pleas*, therefore be taken to have repealed the 23 Hen. 8, c. 15.  
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This case is not within either the words or the meaning of the new statute. The evil intended to be remedied by that act was the practice of executors bringing actions, and shrouding themselves from costs under their representative character; but that is not the case here. Nor does this action come within the words of the act, which speak only of actions brought "in right of the testator or intestate." The statute, then, only meant to include actions in which the cause of action was complete at the time of the testator's or intestate's death. The only case against the defendant is that of *Lysons v. Barrow* (*a*); but the authority of that case has been much doubted, and cannot now be supported. In the later case of *Wilkinson v. Edwards* (*b*), *Lysons v. Barrow* were not referred to; and it does not appear in *Wilkinson v. Edwards*, that there were any counts on promises to the testator.

*Kelly, contra*, relied upon *Lysons v. Barrow*.

PARKE, B.—On looking at the case of *Lysons v. Barrow*, I have no doubt that the point as it arises here was not brought under the consideration of the Court. Since that decision, the question has been before the Court of *King's Bench* (*c*), and they agree in opinion with this Court that *Lysons v. Barrow* cannot be supported. The meaning of the statute is, that executors shall be liable in those cases in which they were not liable before; but it does not touch the case where an executor is suing on a contract made with himself. In this case the plaintiffs were liable to pay costs under the statute of 23 Hen. 8,

(*a*) 10 Bingh. 563; 4 Moore & S. 463; 2 Dowl. P. C. 807, S. C. Will. 4.

(*b*) 1 Bingh. N. C. 301.

(*c*) *Spence v. Albert*, H. T. 5

and the act for the further amendment of the law does *Exch. of Pleas,*  
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 not exempt them from that liability.

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The rest of the Court concurred.

Rule absolute to exempt the plaintiffs from  
 the payment of costs on the first three  
 counts, and discharged as to the last  
 count with costs.

TAYLOR *v.* HILARY.

**ASSUMPSIT.** The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one *Henry Holt* to have goods as he might want them, not exceeding in the whole *200l.*, the defendant undertook and promised the plaintiff to guarantee the payment of such goods; and the plaintiff averred that he, confiding &c., did afterwards, to wit &c., sell and deliver to the said *Henry Holt* certain goods of great value, not exceeding in the whole *200l.*; to wit, of the value of *190l.*, as he the said *Henry Holt* did want them; of which the defendant afterwards, to wit, on &c., had notice. Breach, that *Henry Holt* had not paid for the said goods, or any part thereof, nor had the defendant, although often requested, paid for the same, or any part thereof. Plea, that after the making of the promise and undertaking in that count mentioned, and before any breach thereof, to wit, on the day and year aforesaid, it was, at the special instance and request of the plaintiff, agreed

Declaration stated that the defendant guaranteed the plaintiff in supplying goods to one *H. H.* Plea, that, before breach, it was agreed between the plaintiff and the defendant that the plaintiff should supply goods to *H. H.*, and that they should be paid for at the end of three months by a bill at four months to be accepted by the defendant, which agreement the plaintiff, before breach, accepted in discharge of the former agreement, and released the defendant from the performance

thereof.—*Held*, on demurrer, that the second agreement was an original undertaking, and did not require to be in writing under the Statute of Frauds; that it was not an accord and satisfaction, and that it was a defence to the action as being a substituted contract.

*Exch. of Pleas,* by and between the plaintiff and defendant that the plaintiff should supply to the said *Henry Holt* 200*l.* worth of goods as he should want them, and that such goods should be paid for at the end of three months by a joint bill at four months accepted by the defendant; which agreement of the defendant be the plaintiff, before any breach of the promise and undertaking in the said count mentioned, accepted, in full discharge of that promise and undertaking, and thereby then wholly released and discharged the defendant from the further performance of that promise and undertaking.—Verification.

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To this plea the plaintiff demurred; and alleged as cause of demurrer, that there was no material difference between the agreement set out in the count and that set out in the plea, and that the only difference applied to the time of credit to be given; and that it did not appear by the said plea, but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

*Barstow* in support of the demurrer.—The plea is insufficient, for the reasons assigned in the demurrer.—It does not in substance state an agreement differing from that set up by the plaintiff. [Parke, B.—It differs in this, that it states an agreement to pay by a bill at four months, while the agreement as stated in the declaration was merely to guarantee.] Then the agreement set forth in the plea is not shewn to be binding upon the defendant: being an undertaking for the debt of another, it ought to have been shewn to be in writing, according to the Statute of Frauds, and signed. There is a distinction between declaring upon and pleading such a contract; in the latter case, it must be shewn to possess the requisites of the statute, in order that it may appear to the Court that an action will lie upon it; for he shall not be allowed to take away the plaintiff's action without giving him another. *Case v.*

**Barber (a).** [Parke, B.—The first agreement was a guarantee, but, according to the second agreement the defendant became absolutely bound as an original debtor. In order to bring the case within the authority cited, it must be shewn that the second agreement was a guarantee.] The plea is bad upon another ground. It does not shew that the time of credit given by the bill is still continuing. In cases of goods sold on credit, if the credit has expired, the plaintiff may sue on the implied contract; and if the defendant sets up as a defence that the credit has not expired, it must, since the new rules, be specially pleaded, according to a late decision of the Court of *King's Bench*, *Edmunds v. Harris (b)*. [Parke, B.—I believe some doubts have been expressed with regard to that decision. If the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in his declaration, *viz.* to pay on request.]

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**Per Curiam.**—Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not therefore require an averment of performance.

**Barstow** had leave to amend.

**Crowder** in support of the plea.

(a) Sir Thomas Raymond, 450.      (b) 4 Nev. & M. 182.

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WHITAKER v. THE GOVERNOR AND COMPANY OF THE BANK  
OF ENGLAND.

Where a customer of the Bank of England was in the habit of making his acceptances payable at the Bank, and one of such acceptances being presented for payment at eleven o'clock in the morning was dishonoured for want of assets, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose, it was held, that the Bank, although they had before six o'clock received assets, were not bound to pay the bill, it being after the usual hours of business.

Semble, that it was the duty of the Bank to have informed the notary that they had received assets, and that the bill would be paid the following day.

**ACTION** on the case. The declaration stated, that heretofore, and before the committing of the grievance by the defendants as hereinafter mentioned, the plaintiff exercised, used, and carried on the trade or business of a corn and flour factor with punctuality and integrity, always well and truly and punctually paying and discharging his just debts, and until the time of the committing of the grievance by the defendants as hereinafter mentioned, had never been suspected of being unable or unwilling to pay and discharge the same. That also long before, and until and at the time of the committing of the grievance by the defendants as hereinafter mentioned, certain persons, using the style and firm of *Cooke & Gambling*, and certain other persons, to wit, one *Arthur Bayfield*, and one *Samuel Cooke*, and certain other persons, had been and were respectively in the habit of employing, and had been and were used and accustomed to employ the plaintiff in his said trade and business, and to make large consignments of corn and flour to the plaintiff, to be by him sold and disposed of as such corn and flour factor as aforesaid, for certain reward and commission to him, the plaintiff, payable in that behalf, to the great gain of the plaintiff, and the increase of his said trade and business, and the comfortable support of himself and family. That long before and at the time of the committing of the said grievance by the defendants as hereinafter mentioned, the defendants were bankers, and the trade and business of bankers used, exercised, and carried on; and the plaintiff long before, and until and at the time of committing of the grievance by the defendants as hereinafter mentioned, had been and was a customer of and employed the defendants in the way of their said

trade and business of bankers as aforesaid, upon (amongst others) the terms following, to wit, that they, the defendants, would honour and pay for and on behalf and on account of the plaintiff, out of any cash balance of and payable to the plaintiff that might be in the hands of the defendants as such bankers as aforesaid, any bill or bills of exchange which might be accepted by the plaintiff, payable at the Bank of *England*, upon the same being duly presented there for payment thereof by the person or persons respectively being entitled to the same, and to receive the monies therein mentioned, notice having been left by or on behalf of the plaintiff at the drawing office in the Bank of *England* aforesaid, for the payment thereof, previously to the same becoming due; such cash balance being sufficient for that purpose over and above any claim or lien of the defendants thereon, and independently of any right which the defendants might have to retain the same or any part thereof in their hands, and such cash balance having then been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the defendants, and that the same was sufficient for the purpose of paying such bill or bills over and above any claim or lien of the defendants thereon, and independently of any right that the defendants might have to retain the same or any part thereof in their hands. And the plaintiff further saith, that heretofore, and whilst the plaintiff was such customer of and retained and employed the defendants, as such bankers as aforesaid, to wit, on the 15th day of *December*, in the year of our Lord 1832, the said persons so using the style and firm of *Cooke & Gambling* as aforesaid, made their certain bill of exchange in writing, and directed the same to the plaintiff, and thereby required the plaintiff to pay, six weeks after the date thereof, to one *Samuel Bignold*, Esquire, or order, 425*l.* value received; and the plaintiff then and there ac-

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cepted the said bill, and thereby made the same payable at the Bank of *England*; and the said *Samuel Bignold* then and there indorsed the same to Messrs. *Masterman & Co.*, who at the time when the said bill became due and payable were the persons entitled to the same, and to receive the amount thereof. And the plaintiff further saith, that afterwards and when the said bill became due and payable, according to the tenor and effect thereof, to wit, on the 29th *January*, 1833, the said bill of exchange was duly presented at the Bank of *England* aforesaid, for payment thereof, by and on the part of the said Messrs. *Masterman & Co.*; but that the defendants not regarding their duty as such bankers as aforesaid, nor the terms upon which they were so employed by the plaintiff as aforesaid, but contriving and wrongfully intending to injure, prejudice, and aggrieve the plaintiff, did not, when the said bill of exchange was so presented and shewn to them for payment thereof as aforesaid, honour and pay the said bill; and on the day and year last aforesaid dishonoured and wholly refused to pay the same, although they, the defendants, then had in their hands as such bankers as aforesaid, a cash balance of and payable to the plaintiff, amounting to a large sum of money, to wit, 426*l.* 13*s.* 8*d.*, which was then and there sufficient for the purpose of paying the said bill, over and above any claim or lien of the defendants on the said last-mentioned sum of money, and independently of any right which the defendants had to retain the same, or any part thereof, in their hands. And although such cash balance had then been in the hands of the defendants a sufficient and reasonable time to enable them and their clerks and servants to know that the defendants then had the same in their hands, and that the same was sufficient to pay the said bill over and above any claim or lien that the defendants then had on the said sum of money, and independently of any right that the defendants had to retain the same, or any part thereof, in their hands, and

although notice had theretofore, to wit, on the 1st day of *January, 1833*, been left by and on the behalf of the plaintiff at the drawing office, in the Bank of *England* aforesaid, for the payment of the said bill, for a reasonable time previously to the same becoming due; by means and in consequence of which said premises, notice of the dis-honour of the said bill was then and there given to the said Messrs. *Masterman & Co.*, and also to the said Messrs. *Cooke & Gambling*; and by reason and in consequence thereof the plaintiff was greatly injured and wholly ruined in his credit and circumstances, and was then and there suspected by the said Messrs. *Cooke & Gambling*, and by the said *Arthur Bayfield*, and the said *Samuel Cooke*, and the said other persons who then and there had been and were in the habit of employing and dealing with him in his said business, to be in bad, failing, and insolvent circumstances, and, by reason and in consequence of the premises, then and there refused, and from thence hitherto have ceased and refused, to employ or deal with the plaintiff in the way of his said trade and business as a corn and flour factor, as they otherwise would have done, and thereby the plaintiff hath lost and been deprived of divers large gains and profits which he might and otherwise would have gained and acquired, by reason of being so employed and dealt with by the said Messrs. *Cooke & Gambling*, and by the said *Arthur Bayfield*, and the said *Samuel Cooke*, and the said other persons, amounting to a large sum of money, to wit, the sum of 5000*l.*; and also, by means and in consequence of the premises, divers persons, being creditors of the plaintiff for divers large sums of money, respectively amounting together to a large sum of money, to wit, 10,000*l.*, then and there pressed the plaintiff for the payment of their respective debts; and the plaintiff was then and there forced and obliged, in order to endea-

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*Exch. of Pleas,* your to pay the same, to sell and dispose of divers goods  
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and chattels of him, the plaintiff, for a much less sum  
of money than he might and otherwise would have ob-  
tained for the same, to wit, 5000*l.* less than he might  
and otherwise would have obtained for the same; and the  
plaintiff was then and there forced and obliged to com-  
pound with his said creditors, and hath been by means  
and in consequence of the premises wholly ruined in his  
credit, character, and circumstances; and hath lost his  
connexion and business, and been hindered and prevented  
from gaining any profits or emoluments therefrom as he  
otherwise might and would have done.

Pleas—*First*, That at the time when the said bill of ex-  
change in the said declaration mentioned was presented  
and shewn to them, the defendants, for payment there-  
of, they, the defendants, had not then in their hands  
a cash balance of and payable to the plaintiff, sufficient  
for the purpose of paying the said bill of exchange in  
the said declaration mentioned, in manner and form as  
the plaintiff hath above in his said declaration in that be-  
half alleged. *Secondly*, That at the time when the said  
bill of exchange in the said declaration mentioned was  
presented and shewn to them, the defendants, for pay-  
ment thereof, the supposed cash balance in the said de-  
claration mentioned had not been in their hands a suffi-  
cient and reasonable time to enable them and their clerks  
and servants to know of the same being in the hands of  
the defendants, and that the same was sufficient for the  
purpose of paying the said bill of exchange.

The replication took issue on these pleas.

At the trial, before *Parke*, B., at the Sittings for *Middlesex* after last *Michaelmas* Term, the following appear-  
ed to be the facts of the case. The plaintiff kept an ac-  
count with the Bank of *England*, and the bill mentioned  
in the declaration was accepted by him, payable there. It  
was presented there by a clerk of Messrs. *Mastermans*, the

bankers, on the morning when it became due, the 29th *January*, at a quarter past nine o'clock, and was left there till eleven o'clock, when it was returned to him with an answer, of "not sufficient effects." The state of the account between the plaintiff and the Bank at this time appeared to be as follows. On the evening of the 28th *January* the plaintiff's cash balance amounted to  $33\text{l} 18\text{s}. 8\text{d}.$ , and in the afternoon of the same day, a cheque for  $200\text{l}$ . was paid in, and, according to the custom of the Bank, not having been paid in before four o'clock, was entered short; but on the following morning, before eleven o'clock, credit was given for this sum as cash. On the morning of the 29th, another sum of  $195\text{l}.$  in cash was paid in by the plaintiff, to the credit of his account. The evidence, with regard to the precise period of time when this latter sum was paid in, was contradictory. One of the witnesses stated, that happening to be at the Bank that morning, he saw the plaintiff a little after ten, paying in the money, and that they left the Bank together. For the defendants, several of the clerks of the Bank were called, and, according to their evidence, the money could not have been paid in by the plaintiff before twelve o'clock. The bill was presented again at the Bank, at six o'clock the same evening, by a notary, and the same answer given as in the morning. On the morning of the 30th *January*, a message was sent by the Bank to Messrs. *Masterman & Co.*, in consequence of which the bill was taken to the Bank, where it was paid, together with the sum of  $1\text{s}. 6\text{d}.$  for the noting. It was proved that it was not the custom of the Bank to pay bills after five o'clock, but that a person was stationed to give answers, in case any bills were presented after that hour. The learned judge, in summing up, told the Jury, that the substantial question for them was, whether the plaintiff had a sufficient balance at the Bank, at a reasonable time before eleven o'clock on the morning of the 29th *January*. That the bill was in a course of presentment

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*Exch. of Pleas,* all the time during which it was in the hands of the Bank,  
1835. *viz.* from a quarter past nine to eleven; but that the presentment after banking hours was not sufficient to charge the defendants, who were not bound, as between principal and agent, to pay the bill after five o'clock. That the issues raised by the pleadings were, whether the Bank had sufficient funds, and whether the cash balance had been in their hands a sufficient time to enable them to know of the same; and therefore the jury must be satisfied, not only that there were funds at eleven o'clock, when the bill was returned, but that such funds had been in the hands of the defendants a reasonable time before that hour, so as to have enabled them to have knowledge of the fact. That, with regard to the payment of the 1*s.* 6*d.* for noting, by the Bank, it might be referred to the omission of the defendants to inform the notary that the bill would be paid the following day, which might induce the defendants to think it proper in them to pay that charge. His Lordship concluded with telling the jury, that the simple question was, whether the plaintiff had sufficient funds at the Bank a reasonable time before eleven o'clock. The jury having found a verdict for the defendants—

*Thesiger* moved for a new trial on the ground of a misdirection, and also on the ground that the verdict was against evidence. The learned Judge ought to have directed the jury, that it was the duty of the defendants to have paid the bill on the evening of the day when it was presented by the notary; and according to the weight of evidence, there was a sufficient balance in the hands of the defendants a reasonable time before the bill was presented for payment on the morning of the 29th January. It must be admitted, that a distinction exists between a presentment at the house of a private individual and a presentment at a banker's. In the latter case, the bill must be presented within the usual banking hours;

**Parker v. Gordon** (*a*), **Elford v. Teed** (*b*); while in other cases, it must be presented within reasonable hours, which must depend upon the circumstances of each case. In **Morgan v. Davison** (*c*), a presentment between six and seven o'clock in the evening, at a counting house in *London*, was held good. The general rule, that in order to render a presentment good, it must be made within the customary or reasonable hours, is to be taken subject to this qualification, that though the bill be presented not within those hours, yet if the drawee or acceptor has stationed a person for the purpose of giving an answer out of those hours, and the bill is presented to that person, such presentment is good. In **Henry v. Lee** (*d*), Lord *Ellenborough* says, "It is not sufficient, in general, if nobody is there to receive; but if somebody is there, and the person presenting the bill gets an answer, it is sufficient;" and **Bayley**, J., adds, "If it is presented after the usual hours, it is at the peril of the person presenting it; for if nobody is there, it will not do, but if there is, then it is immaterial at what time it is presented." In **Garnett v. Woodcock** (*e*), the bill was presented between seven and eight o'clock in the evening, at Messrs. *Denison & Co.*'s, the bankers; and a boy who was stationed there, gave an answer—"No orders." It was contended that this was not a valid presentment; but it was held to be good. Lord *Ellenborough*, at the trial, said, "Bankers do not usually pay at so late an hour; but if a person be left there who gives a negative answer, there is no difference between such a case and that of a

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(*a*) 7 East, 385.

(*b*) 1 M. & Selw. 28.

(*c*) 1 Stark. 114. See also *Barclay v. Bailey*, 2 Campb. 527, and *Wilkins v. Judis*, 2 B. & Ad. 183. In the latter case, a bill presented between seven and eight o'clock in the evening, in Godliman

Street, London, was held in time, and *Parke*, J., said, he thought eight in the evening was a reasonable time.

(*d*) 2 Chitty's R. 125.

(*e*) 1 Stark. 475; 6 M. & Selw. 44, S. C.

*Exch. of Pleas.*, merchant. I think it is perfectly clear, that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient, if made before twelve at night." *Garnett v. Woodcock* precisely resembles the present case: in both instances, the bill was presented out of the usual hours of business, but a person was stationed to give an answer, and an answer was given. [Parke, B—It does not appear in either case that the person was stationed to *pay* the bill; and in this case it was proved not to be the custom of the Bank, in any case, to pay bills after five o'clock.] In that view of the case, the presentment of a bill out of the usual hours is merely nugatory. [Lord Abinger, C. B.—It is the practice in *London* for notaries to present bills, for the purpose of their being protested, in the evening; and it is in order that the notary may receive an answer, and so be enabled to make a protest, that persons are stationed to give answers.] A presentment good for one purpose must be good for another. [Lord Abinger, C. B.—The contract between the Bank and their customers, is to pay the bills of the latter within the usual hours of business.]

Lord ABINGER, C. B.—With regard to the application for a new trial, on the ground that the verdict was against the weight of evidence, I think that it ought not to be granted; for, in my opinion, the evidence rather preponderates in favour of the defendants. At all events, it was a question for the jury, and they have decided it. With regard to the other point, the misdirection of the learned Judge, it appears to me, that the real question is not raised upon these pleadings. Upon these pleadings, the question merely is, whether the defendants were bound to pay this bill when it was presented by the notary at six o'clock in the evening, and when it is clear that they had sufficient funds in their hands, of which they were aware. It was proved to be the practice of the Bank not to pay bills after five

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o'clock; no specific contract with the plaintiff varying this practice was proved, nor could any such contract be inferred. A presentment after five o'clock for the purpose of charging the drawer, is a very different thing from a presentment for the purpose of obtaining payment. The neglect of the Bank, if any, was not in omitting to pay the bill when it was presented by the notary, but in not giving notice to him, that since the presentment in the morning they had received assets from the acceptor, and that the bill would be paid the following day. That point, however, does not arise upon the pleadings. For these reasons, I think there is no ground for disturbing the verdict.

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PARKE, B.—I am of the same opinion, and I should not have been satisfied if the verdict had been the other way. The plaintiff in substance complains, that his agents, the defendants, have neglected to pay a bill of exchange, which, according to their usual course of dealing, they ought to have paid. But what was the contract between them?—that the defendants should pay all bills presented at the Bank during the accustomed hours of business, provided they were in funds. There has been no breach of this contract, and therefore, I think that the verdict ought to stand.

BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

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NOEL *v.* ISAAC.

TRESPASS by an attorney for holding him to bail, notwithstanding his privilege. In consequence of a clerical error, certain words had been omitted in the replication, on account of which the defendant demurred. Upon the demurrer coming on for argument, Kelly for the plain-

Trespass is not  
maintainable  
for holding an  
attorney to bail,  
notwithstand-  
ing his privilege.

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seers. They, and not the vestry clerk, are treated in the action as the parties contracting, and on the face of the record, the promise is laid to be by them: the directors, though not parties to the suit, are parties to the contract. Where trustees were empowered by act of parliament to sue in the name of their treasurer for the time being, in an action by them, upon one of their body being called as a witness, Lord *Tenterden* was strongly inclined to reject him as inadmissible. *Whitmore v. Wilks* (*a*). There the witness was called for the plaintiffs, and here for the defendants; but that circumstance does not affect his competency. The defendants are not a corporation; and, except for the clause in the act of parliament, they must have been sued as individuals. Their real character of defendants is not altered by that clause: the witness, therefore, was substantially a party to the suit; and, as such, incompetent.

*Bompas*, Serjt., and *Petersdorff*, contra, were stopped by the Court.

**PARKE, B.**—The trustees are not personally liable; and the only objection, therefore, to the competency of the witness would have been, supposing the clause authorizing these trustees to be sued in the name of their clerk not to have existed, that he was a nominal party to the suit. That objection, however, is removed by the act of parliament, and the witness, therefore, is competent in the same manner as other inhabitants (*b*).

The rest of the Court concurred.

Rule absolute.

(*a*) *Moo. & M.* 214, 220.

(*b*) By the 214th section of the local act, inhabitants of the pa-

rish are made competent witnesses.

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**TRESPASS**, for assaulting the plaintiff, and taking him to a police station-house. Pleas—*first*, not guilty; *secondly*, that the defendant was possessed of a dwelling-house in the city of *London*, and that the plaintiff entered and came into the said house, and made a great disturbance and affray therein, and insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and disquieted them in their possession thereof, against the King's peace; whereupon the defendant requested the plaintiff to cease his disturbance, and depart from the said house, which the defendant refused to do, and continued in the said house, making the said disturbance and affray therein; whereupon the defendant, in order to preserve the peace, and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a policeman to take the plaintiff into custody, to be dealt with according to law. The plea then alleged that the policeman took the plaintiff into custody, and conducted him out of the said house to the police station for examination, and to be dealt with according to law.

To this there was the general replication, *de injuriā*.

house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody.

It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house.

*Held*, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray.

*Held*, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved.

Trespass for  
assault and  
false imprison-  
ment, and  
taking the  
plaintiff to a  
police-station.  
Plea, that the  
defendant was  
possessed of a  
dwelling-house,  
and that the  
plaintiff entered  
the dwelling-  
house, and then  
and there in-  
sulted, abused,  
and ill-treated  
the defendant  
and his servants  
in the dwellings-  
house, and  
greatly disturb-  
ed them in the  
peaceable pos-  
session thereof,  
in breach of the  
peace; where-  
upon the defen-  
dant requested  
the plaintiff to  
cease his dis-  
turbance, and  
to depart from  
and out of the  
house; which  
the plaintiff re-  
fused to do, and  
continued in the

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At the trial before *Parke*, B., at the *London* sittings after last *Trinity* Term, the plaintiff obtained a verdict on the general issue, with 15*l.* damages; but the jury found a verdict for the defendant on the issue upon the special plea, the learned Judge giving the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion that the facts proved in evidence did not support that plea. *Thesiger* having, in *Michaelmas* Term last, obtained a rule accordingly, or for judgment *non obstante veredicto*—

*Bompas*, Serjt., shewed cause; and *Thesiger* was heard in support of the rule, in the same term; and the Court took time to consider. But the facts of the case and the arguments are so fully stated in the judgment of the Court, that it has been thought unnecessary to state them here.

*Cur. adv. vult.*

**PARKE**, B., now delivered the judgment of the Court.—This was an action of trespass and false imprisonment, tried before me at the sittings after *Trinity* Term last, at *Guildhall*. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuria sui proprii absque tali causd.* On the trial, the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him

on the special plea, if the Court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgment *non obstante veredicto*, the case was fully argued before my Brothers *Bolland, Alderson, Gurney*, and myself, last Term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

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*v.*  
SIMPSON.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window, with a ticket apparently attached to it, denoting a low price, sent his companion in to buy it; the shopman refused, and demanded a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it "an imposition." Some of the shopmen desired him to go out of the shop in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing, or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on—many persons were there, and others about the street door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the mean-

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time the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop insisting on his right to remain there, and a mob gathering round the door; when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict, in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police-officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat. 10 *Geo. 4.*, c. 44, s. 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and

there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest, in order himself to take sureties of the peace, for he cannot administer an oath; *Sharrock v. Hannemer* (a); but whether he has that power, in order to take before a magistrate, that he may take sureties of the peace, is a question on which the authorities differ. Lord *Hale* seems to have been of opinion that a constable has this power. 2nd *Hale's Pleas of the Crown*, 89. And the same rule has been laid down at *Nisi Prius* by Lord *Mansfield*, in a case referred to in 2nd *East's Pleas of the Crown*, 306; and by *Buller*, J., in two others, one quoted in the same place, and another cited in 3 *Campb. N. P. C.* 421. On the other hand, there is a *dictum* to the contrary in *Brook's Abt. Faux Impt.* 6, which is referred to and adopted by Lord *Coke* in 2nd *Inst.* 52; Lord *Holt*, in *The Queen v. Tooley* (b), expresses the same opinion. Lord Chief Justice *Eyre*, in the case of *Coupey v. Henley* (c), does the same. And many of the modern text books state that to be the law. *Burn's Justice*, 26th edit. *Arrest*, 258; *Bacon's Abt. D. Trespass*, 53; 2 *East's Pleas of the Crown*, 506; *Hawkins's Pleas of the Crown*, book 2, c. 13, s. 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the

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(a) *Cro. Eliz.*, 376, Owen, 105,  
*S. C. nomine, Scarrel v. Tanner.*

(b) 2 *Ld. Raym.* 1301.  
(c) 1 *Esp.* 540.

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affray. It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. *Lambard*, in his *Eirenarcha*, chap. 3, p. 130, says, "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol till it be known whether he, so hurt, will live or die, as appeareth by the stat. 3 Hen. 7, c. 1." In *Hawk. P. C.* book 1, c. 63, s. 11, it is said, that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice *Buller*, are to be found in 9 *Went. Plead.* 344, 345; and *De Grey*, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shews a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed

acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord Hale, P. C. (a). The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighbourhood, and the persons of all those concerned, from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace officers, whose power of interposition on their own view appears not to differ from that of any of the King's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer.

This brings me to the second question, whether the

(a) Vol. 2, p. 89.

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plea upon the record was substantially proved. I thought upon the trial that it was, but, upon further consideration, I concur with the rest of the Court in thinking that it was not. The plea was as follows:—"And the defendant says, that before and at the said time when &c. the said defendant was lawfully possessed of a certain dwelling-house in the city of *London*, and the said defendant being so possessed thereof, the said plaintiff just before the said time when &c. entered and came into the said dwelling-house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the King; whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein; whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of *London*, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with according to law; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove *all*. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment, it is necessary to prove such of the facts *alleged* as

would do so. The allegations which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace; but the fact of an assault on the plaintiff himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof failed; but, as this is a case in which an amendment would have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion, that the plea was substantially proved, at the time, probably prevented an application to amend, we think that there should be a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *stet processus*.

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Rule accordingly.

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Where a cause in the Palace Court was removed by *habeas corpus* into the Court of King's Bench, but was remanded back by *procedendo*, and afterwards interlocutory judgment was signed in the Court below, and a writ of inquiry executed:—*Held*, that the bail of the same defendant in another action brought in this Court had no right to remove the cause in the Palace Court again by *habeas corpus*, in order that the defendant might be rendered in discharge of his bail in the action in this Court.

But the Court gave the bail time to render, until fourteen days after the expiration of the custody of the Palace Court, no cause being shewn against so much of the rule for such time.

**I**N this case *Mansel* had obtained a rule, on the part of the defendant's bail, calling upon the plaintiff in this cause, and one *Richard Taylor*, the plaintiff in a cause in the Palace Court, against the same defendant, to shew cause why the writ of *habeas corpus*, sued out of this Court, directed to the Judge of the Palace Court, should not be duly returned and filed in this Court; and why the bail of the defendant in this action should not, after the determination of the custody of the defendant in the Palace Court, have fourteen days' time to render the said defendant in this action. It appeared from the affidavits, that a *capias* issued against the defendant on the 21st *October*, and bail justified on the 8th *November*. On the 6th *October*, a writ issued out of the Palace Court, at the suit of *Taylor*, and bail was put in there. On the 11th a writ of *habeas corpus* was sued out by the defendant to remove that cause into the *King's Bench*, which cause was afterwards remanded by *procedendo*. On the 31st a writ of inquiry was executed, and the defendant was rendered to the *Marshalsea*. A second writ of *habeas corpus* was sued out of this Court on the 14th *November*, to remove the cause and body of the said defendant, which was lodged at the Palace Court, and to which there was a return by the Judge of that Court under and by virtue of the clause in the 21st *Jac. 1*, c. 23.

*Walsh* shewed cause on the behalf of *Richard Taylor*, but the plaintiff did not appear.—*First*, where a cause has been once removed and a *procedendo* awarded, the cause can never afterwards be brought back again. That is expressly provided by the stat. 21 *Jac. 1*, c. 23, s. 3, which enacts, that “if any action, bill, plaint, suit, or cause, which shall hereafter be brought, commenced, or de-

pending, in any Court of record, in any city, liberty, town corporate, or elsewhere, shall be removed or stayed by any writ or writs of *habeas corpus*, or any other writ or writs to be sued forth or out of any of his Majesty's Courts at *Westminster*, or the Court of the Great Sessions in *Wales*, or any other Court as aforesaid, that if afterwards the same action, bill, plaint, suit, or cause, shall be remanded or sent back again by any writ or writs of *procedendo*, or any other writ whatsoever, that then the said action, bill, plaint, suit, or cause, shall never afterwards be removed or stayed before judgment, by any writ or writs whatsoever, to be sued forth or out of any of his Majesty's said Courts at *Westminster*, or the said Courts of Great Sessions in *Wales*, or any other Court as aforesaid." In this case, although interlocutory judgment has been signed, and a writ of inquiry has been executed, no final judgment has been signed, and therefore the cause cannot be again removed. *Secondly*, the writ of *habeas corpus* was not delivered in proper time. By the 43 *Eliz.* c. 5, it is provided, that "no writ of *habeas corpus*, or any other writ, sued forth or to be sued forth by any person or persons whatever, out of any of her Majesty's Courts of record at *Westminster*, to remove any action, suit, plaint, or cause, depending or to be depending in any Court or Courts within any city or town corporate, or elsewhere, which have or shall have jurisdiction, &c., to hold plea in any action, plaint, or suit, shall be received or allowed by the Judge or Judges, officer or officers of the Court or Courts wherein or to whom such writ or writs shall be delivered (but that he and they shall and may proceed in the said cause and causes ready to be tried, as though no such writ or writs were sued forth or delivered to him or them), except that the said writ or writs to be delivered to the Judge or Judges, officer or officers of the said Court, *before that the jury which is to try the cause in question between the party or parties*

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*Esch. of Pleas.*, plaintiffs, and the party or parties that sued forth the said  
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*LAWES v. HUTCHINSON.* writ or writs, or for whose benefit the said writ or writs is  
 or shall be sued forth, *have appeared, and one of the said jury sworn to try the said cause.*" And in *Cox v. Hart* (a) it was held, that it must also be before any one of the inquest are sworn after a judgment by default (b). This application was therefore too late after interlocutory judgment had been signed, and a writ of inquiry executed.

*Mansel, contra.*—This is an application by the bail to bring up the body of the defendant, to enable them to render him; and that is an object which the Court will favour. In *Waugh v. Ashford* (c), where a defendant had been committed to *Newgate* by commissioners of bankrupt, the Court of *Common Pleas* gave the bail time to render the defendant. The difficulty is, whether this Court have power to order the body of the defendant to be brought up from the prison of the *Marshalsea*. If the Court of *King's Bench* has the power of ordering up a defendant in custody in a cause in the Palace Court, in order that he may be rendered, why has not this Court? It will be an extreme hardship on the bail in this case if they should not be enabled to have the defendant brought up into this Court in order to render him, or at least that he should go back to the prison of the Palace Court charged with this debt. There is nothing in the terms of the statute 21 *Jac.* 1 to affect this proceeding. The statute speaks of causes not removed before final judgment, but final judgment is not signed in the Palace Court, and therefore the prohibition in that statute does not apply. The cause may be removed here, and the plaintiff may pursue his proceedings to final judgment in this Court. [Parke, B.—The meaning of the statute in restraining it to an applica-

(a) 2 Burr. 759.

(b) Archb. Pr. K. B. Vol. 2, 187.

(c) 3 Dowl. P. C. 123. Vide 1 Bing. N. C. 294, S. C.

tion before final judgment is, that the cause may be removed afterwards by writ of error.] Even if final judgment be signed, yet this Court has an inherent power to remove the body of the defendant for the purpose of render in this cause, and then he will stand charged with the execution in the Palace Court. At all events, as the plaintiff [in the action does not appear, that part of the rule which seeks for time to render must be made absolute.

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**LORD ABINGER, C. B.**—The keeper of the *Marshalsea* is not an officer of this Court, and I do not see therefore how this Court has power to assist you.

**PARKE, B.**—Have we any power to remove a cause, after judgment, out of the Palace Court, except by writ of error, unless it be under the statutes (*a*) which authorise execution out of the superior Courts, where there is not sufficient property within the jurisdiction of their process? The Court of *King's Bench* may have jurisdiction over the keeper of the *Marshalsea*, who is an officer of that Court. The rule must be discharged with costs, as far as it regards *Taylor*, and the removal of the body of the defendant from the prison of the Palace Court; but it may be made absolute as to the other part.

Rule accordingly.

(*a*) 19 Geo. 3, c. 70, s. 4; 32 Geo. 3, c. 68, s. 1.

*Eccles. of Pleas,  
1835.*

SUTTON v. MARY ANN BURGESS.

When in the copy of the writ served on the defendant the letter "s" was omitted in the word "she;"—*Held*, to be immaterial, as it could not mislead.

Where, on the copy of the writ delivered, the indorsement was, "if the amount thereof be paid within four days from the arrest or service hereof;"—*Held* sufficient, and that the words "arrest or" might be rejected as surplusage.

**I**N this case *Mansel* had obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground that in the copy of the writ served on the defendant the letter "s" was omitted in the word "she," before the words "shall be found in your bailiwick," which made it "he" instead of "she;" and, therefore, that it was not a true copy of the writ, which was correct. He cited *Hodgkinson v. Hodgkinson* (*a*). He also objected that in the indorsement of the debt and costs claimed, the notice concluded, "if the amount thereof be paid within four days from the *arrest or service* hereof:" when according to rule 2, H. T. 2 Will. 4, it ought to have been from the "service hereof."

*Archbold* shewed cause.—The recent case of *Pocock v. Mason* in the *Common Pleas* (*b*), is an authority against the first objection. There the word "the" and the word "by" were omitted in the copy; and the Court said that the defendant had been served with that which was in substance a copy of the process, and that the omissions were too trivial to constitute a variance. As to the second objection, all the cases where the indorsement has been held irregular, have been cases where the word "service" has been omitted altogether. [*Parke, B.*—The course in that case is to allow the party to amend.] In the present case we are not bound to amend, because we have said "after service hereof;" although, true it is, we have also said more, but that is merely surplusage.

*Mansel, contra.*—The copy served must be a correct copy of the writ, which this is not. *Smith v. Pennell* (*c*).

(*a*) 2 Dowl. P. C. 535. 1 Bing. N. C. 245.

(*b*) 5 Moo. & Scott, 51; S. C. (*c*) 2 Dowl. P. C. 654.

Then, as to the second objection: in *Hooper v. Waller* (*a*), where the copy of the process delivered to the defendant was indorsed, "if the amount thereof be paid within four days from the *arrest hereon*," this Court held it to be an irregularity.

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**Lord ABINGER, C. B.**—There is nothing in either of the objections. As to the omission of the letter "s," the defendant could not have been misled by it. The case cited from the Court of *Common Pleas* is not distinguishable from the present. As to the second objection, the words "arrest or" may be rejected as surplusage. The defendant must know at what time she was served, and that she had four days from the service of the copy within which to pay the debt and costs, to avoid any further expense.

Rule discharged with costs.

(*a*) 1 C. M. & R. 437.

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#### MOODY v. ASLATT.

THIS was an action against the commissioners of a turnpike road for negligently leaving open a hole in the road, whereby the plaintiff's coach had sustained damage, and the cause had proceeded to issue. The plaintiff's name in the writ and declaration, and all subsequent proceedings, was stated to be "*William Moody*" instead of "*John Moody*," which was the name of the person really intended to be plaintiff.

Plaintiff declared by the name of "*William Moody*," and the cause proceeded to issue in that name. It was sworn that the party intended as plaintiff was *John Moody*, but there appeared to be a *William Moody*, a son of *John*, who was connected with the transaction in the name of *John* in

*Humphrey* moved for a rule to shew cause why the writ, declaration, and all subsequent proceedings should not be

question. The Court refused a rule to amend the proceedings by inserting the name of *John Moody*, observing that if he, *John Moody*, were really the person originally intended as plaintiff, the misnomer could not be taken advantage of at the trial.

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amended by substituting the plaintiff's real name "John" instead of "William." It appeared that there was a *William Moody*, the plaintiff's son, who was driving his father's coach at the time the injury happened; but it was sworn that the action was brought by the father.

**PARKE, B.**—If the facts are as stated, the plaintiff can safely go on to trial. The error on that supposition is a mere misnomer, of which the defendant cannot now take advantage. If the son was originally intended to be the plaintiff, the Court would not allow the amendment for the purpose of letting in his evidence.

Rule refused.



RICHARDS *v.* THOMAS, Gent., one &c. (*a*).

**ASSUMPSIT** on a promissory note for the sum of 422*l.* 9*s.*, dated 6th *April*, 1833, made by the defendant, and payable to the plaintiff three months after date. Plea—the general issue. At the *Spring Assizes* for the county of *Carmarthen*, in the year 1834, before *Gurney, B.*, the following appeared to be the facts of the case. In the year 1826, a considerable sum of money was advanced by the plaintiff to the defendant, who was a solicitor, for the purpose of being laid out by the latter upon mortgage. The sum of 400*l.* was accordingly advanced upon the A. sum of 400*l.*, belonging to A., was put by him into the hands of B., his solicitor, who laid it out on mortgage, and the deeds were deposited with A. Interest being in arrear, and A. pressing for payment, B. gave a promissory note, payable three months after date, to A., for the amount of principal and interest, and it was agreed at the time of giving the note, that A. should deliver up the deeds to B., and should hold the note till the sale of the mortgaged premises should be completed. When the note became due, A. sued B. upon it, though the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The Judge left it to the jury to say whether the note was given on a condition precedent, that the deeds should be delivered up:—*Held*, that it ought to have been left to them to say what the consideration of the note was, and whether it had wholly failed or not.

(*a*) The report of this case, which was argued in *Trinity Term*, has been unavoidably postponed.

security of certain property called the *Green Grove* estate, but whether this sum of 400*l.* was part of a larger sum advanced generally to the defendant, or was a specific sum placed by the plaintiff in the hands of the defendant as his solicitor, to be laid out for the plaintiff on mortgage, was a matter of dispute between the parties. A regular mortgage was executed, and the deeds were deposited with the plaintiff. The interest upon the money advanced having become in arrear, the plaintiff pressed the defendant to give him a promissory note for the amount, and the defendant said that he would give the note, provided the plaintiff would deliver up to him the deeds deposited with him, which the plaintiff said he would do. The defendant then proposed that the plaintiff should hold the note until the completion of the sale of the *Green Grove* estate, to which the plaintiff assented. The title deeds were not delivered up to the defendant, nor was the sale of the *Green Grove* estate completed at the time of the action being brought. Upon the evidence of these transactions being tendered on behalf of the defendant, it was objected by the plaintiff's counsel that it was inadmissible, on the ground that it was an attempt to vary a written instrument by parol; and the case of *Moseley v. Hanford* (a) was cited. For the defendant it was answered, that the evidence did not go to vary the terms of the note, but to impeach the consideration; that the note was only given upon condition that the deeds should be delivered up to the defendant, and that delivery not having taken place, the consideration had failed. The learned Judge, with much reluctance, admitted the evidence. He told the jury that the question was, whether the delivering up of the deeds was not a condition precedent to the recovering upon the note. The jury found a verdict for the defendant, on the ground that the deeds were not delivered

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RICHARDS  
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(a) 10 B. & C. 729.

*Exch. of Pleas,* up ; but the learned Judge gave the plaintiff leave to move  
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to enter a verdict for the amount of the note. *E. V. Williams* having obtained a rule accordingly, to enter a verdict for the plaintiff, or for a new trial—

*John Evans* was about to shew cause, when the Court called upon

*E. V. Williams*, in support of the rule.—The verdict is wrong on two grounds. *First*, the evidence ought not to have been admitted, because it went to vary the written contract by parol; and *secondly*, if admissible, it only shewed a partial failure of consideration, which was no answer to the action. Where a promissory note is given, payable on demand, oral evidence of an agreement entered into when it was made, that it shall not be paid until the happening of a given event, is inadmissible. *Moseley v. Hanford* (*a*). In *Hoare v. Graham* (*b*), it was ruled, that, in an action on a bill of exchange, the defendant cannot shew that at the time when it was drawn it was agreed that it should be renewed and payment not be demanded. So in *Rawson v. Walker* (*c*) Lord *Ellenborough*, C. J., ruled that the defendants undertaking to pay the note on demand, could not adduce evidence to shew that it was not to be so paid but upon a contingency. In *Free v. Hawkins* (*d*), *Dallas*, C. J., says, “If the parties mean to vary the legal operation of an instrument, they ought to express such a variance ; if they do not express it, the legal operation of the instrument remains. The effect of the evidence would be to vary the note in question, and to control its legal operation ; and such evidence is, I think, inadmissible.” In *Woodbridge v. Spooner* (*e*), evidence was offered for the purpose of shewing that a note

- (*a*) 10 B. & C. 729.  
 (*b*) 3 Campb. 57.  
 (*c*) 1 Stark. 361.

- (*d*) 8 Taunt. 92.  
 (*e*) 3 B. & A. 233.

made payable on demand should not be payable until after the death of the maker. *Abbott*, C. J., there says, "It is contrary to the rules of law to admit extrinsic evidence to shew that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself." That the non-delivery of the deeds was not a defence as a condition precedent, appears from the case of *Spiller v. Westlake* (*a*). That was an action by the payee against the maker of a note; and it was held to be no defence that the payee had agreed to convey an estate to the maker, in consideration of a sum of money then paid or secured to be paid to the maker, being the sum mentioned in the note, and of a further sum to be paid at a future day, and that such estate had never been conveyed. *Moggridge v. Jones* (*b*) is to the same effect. But supposing the evidence admissible, still there was no defence; for in order to make the want of consideration a good defence, it must appear that there was a total failure of consideration; such, as supposing money to have been paid, would have supported money had and received for the recovery of such money. Here the failure of consideration was only partial; for the consideration was not only the giving up of the deeds, but the previous receipt of the money by the defendant for the purpose of being laid out on mortgage. That a partial failure of consideration is no answer to an action on a bill or note, appears from the cases of *Morgan v. Richardson* (*c*), *Tye v. Gwynne* (*d*), and *Day v. Nix* (*e*). Independently of the delivery of the deeds, there was another and distinct consideration, *viz.* the liability of the defendant in respect of the money advanced; and even supposing that the money was advanced merely for the purpose of being laid out by

*Exch. of Pleas,*  
1835.

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*v.*  
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(*a*) 2 B. & Ad. 155.

487.

(*b*) 14 East, 486.

(*d*) 2 Campb. 346.

(*c*) 1 Campb. 40, n.; 3 Smith,

(*e*) 9 B. Moore, 159.

*Exch. of Pleas,*  
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the defendant as the solicitor for the plaintiff, and that the loan was in no respect to the defendant, yet under the authority of *Popplewell v. Wilson* (a), there was a good consideration for the note in the debt of the mortgagor.

**Lord LYNDHURST, C. B.**—We think that the question of consideration was not properly left to the jury. It was for them to say what the consideration of the note really was. It may have been that the defendant gave the note from a feeling that he was bound in honour to do so. Possibly the consideration may have been the plaintiff's giving up his remedy against the mortgagor. The case must go before another jury, for the purpose of ascertaining what was the consideration, and whether it wholly failed or not.

Rule absolute for a new trial (b).

(a) 1 Str. 264.      (b) See *Foster v. Jolly*, ante, p. 703.

#### CLEMENTS v. NEWCOME.

Where in an action for a libel, the venue was laid in *London*, and the defendant moved to change it to *Lincoln* on the usual affidavit, and on a rule being obtained to bring back the venue, it appeared from the affidavit that the libel had been published in *London* as well as *Lincoln*:—

*Held*, that the plaintiff was entitled to have the venue brought back to *London*, without entering into an undertaking to give material evidence there.

**I**N this case, on the application of *R. V. Richards*, a rule had been obtained to change the venue from *London* to *Lincoln*, on an affidavit that the cause of action arose in that county.

On a subsequent day, *W. H. Watson* obtained a rule to bring back the venue, on an affidavit stating that the cause of action was a libel, and that the libel had been published in *London* as well as in the county of *Lincoln*. Against which rule

*R. V. Richards* now shewed cause, and contended, that the plaintiff was not entitled to bring back the venue without undertaking to give material evidence in *London*.

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1835.  
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**PARKS, B.**—The objection is, that the defendant was irregular in moving to change the venue originally, as it is sworn that the newspaper containing the libel was published in *London*.

Rule absolute to bring back the venue.

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STEWART and Another, Assignees of HENRY GRIMSDALE, a Bankrupt, *v.* MOODY and Another.

**TROVER** for certain furniture and goods, the property of *Henry Grimsdale*, the bankrupt. The defendants pleaded—*First*, not guilty; *secondly*, that *Henry Grimsdale* was not a bankrupt; *thirdly*, that before his bankruptcy, he assigned the said goods and chattels to the defendants. The replication to the *third* plea, after setting out an indenture of assignment, whereby the said *Henry Grimsdale* assigned all his property to the defendants, in trust, to pay off a mortgage, and afterwards to pay and discharge all his just debts, alleged that the said *Henry Grimsdale* was a trader; that he was in embarrassed circumstances at the time he executed the assignment; that it was fraudulently executed by the said *Henry Grimsdale*; and that no notice was published in the *Gazette* two months after it was executed; that he thereby became a bankrupt; and being indebted to one *Harriet Reeves* in the sum of 100*l.*, a *fiat* in bankruptcy issued against him, under which the plaintiffs were appointed assignees. To this replication there was a re-joinder, denying that any debt was due to *Harriet Reeves*,

Where a trader assigned by deed all his property in trust for the benefit of his creditors:  
—*Held*, that it was an act of bankruptcy under 6 Geo. 4, c. 16, s. 3, although in so doing, he did not intend to defeat or delay his creditors, as, that being the necessary consequence of the assignment, he must in law be taken to have intended it.

*Eccles. of Pleas,* and also, that the bankrupt executed the deed fraudulently, and with intent to defeat or delay his creditors.

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" *Moody.*

Notice was given to dispute the act of bankruptcy, and the petitioning creditor's debt. At the trial before *Gurney*, B., at the *Middlesex* sittings after last term, the indenture of assignment stated in the replication, was proved to have been executed on the 2nd of November, 1832, and the debt to Mrs. *Reeves* was proved to the satisfaction of the jury. The plaintiffs insisted that the deed was an act of bankruptcy; and the learned Judge, being of that opinion, directed the jury to find a verdict for the plaintiffs; which they accordingly did.

*Biggs Andrews* now moved for a new trial, on the ground of misdirection. This deed of assignment is not an act of bankruptcy under the 6 Geo. 4, c. 16, s. 3. It is admitted, that under the statute 1 Jac. 1, c. 15, s. 2, such a deed has been held to be an act of bankruptcy. But the language used in the two statutes is different. The statute of *James*, after enumerating various other acts by which traders shall become bankrupt, says, "or make or cause to be made any fraudulent grant or conveyance of his, her, or their lands, tenements, goods, or chattels, *to the intent or whereby* his, her, or their creditors shall or may be defeated or delayed for the recovery of their just and true debts." Under that statute, the intent was not material; but the present act is totally different. The 6th Geo. 4, c. 16, s. 3, after enumerating most of the same acts as are mentioned in the former statute, proceeds thus:—"or make or cause to be made any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader making or causing to be made any of the

acts, deeds, or matters aforesaid, *with intent* to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." It is therefore essential, under this statute, to shew the intent with which the deed was granted. It must be admitted, that under the statute of *James*, such a deed as this, has, in a variety of decisions, been held to be an act of bankruptcy, though Lord *Eldon* appears, in *Ex parte Bourne* (*a*), to have doubted whether the principle of those decisions had not been carried too far. And in *Dutton v. Morrison* (*b*), Lord *Eldon* treats Lord *Mansfield's* decision in *Worseley v. De Mattos* (*c*), as leaving it open to parol evidence. But although the use of the words in the former act, "to the intent, or whereby the creditors may be defeated or delayed," might warrant the construction put upon it, in cases where creditors may in fact be delayed, though such were not the intention of the parties; yet, in the latter act, the words "or whereby" are omitted, and it is therefore open to contend, that the intent to defeat or delay the creditors is now requisite and material to constitute an act of bankruptcy. No such intent in this case existed, and therefore the indenture of assignment did not amount to an act of bankruptcy.

**PARKE, B.**—It was settled by *Robertson v. Liddell* (*d*); that an assignment of all a trader's effects was an act of bankruptcy. It was there decided that the words "or whereby" in the statute of *James*, did not alter the previous words "to the intent," and that the words "to the intent or whereby his creditors shall or may be defeated or delayed," were to be read "to the intent his creditors shall or whereby they may be defeated." The present statute is the same in effect, only the expressions are more concise, and

(*a*) 16 Ves. 148.

(*c*) 1 Burr. 467.

(*b*) 17 Ves. 193.

(*d*) 9 East, 487.

*Exch. of Pleas,*  
1835.

STEWART  
v.  
MOUNT.

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the words "with intent," &c., occur at the end of the section, as applicable to all the different kinds of acts of bankruptcy mentioned. The present act was not intended to alter the former law in this respect; and it has been clearly settled, that if the necessary consequence of a man's act is to delay his creditors, he must be taken to intend it. When a man assigns all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy. This deed, being an assignment by *Grimsdale* of all his property, is, therefore, clearly an act of bankruptcy.

BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

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#### CALL v. THELWELL.

On an application by the bail to stay proceedings on the bail-bond on payment of costs, the affidavit stated that the application was made by them "at their own expense, and for their own indemnity;"—  
*Held*, that the affidavit was irregular for not complying with the rule 59 Geo. 3.

The plaintiff is not entitled to insist upon the bail-bond standing as a security, where, the defendant not being in custody, the plaintiff has not declared *de bono esse*.

**I**N this case, *Addison* had obtained a rule to shew cause why the proceedings taken on the bail-bond should not be stayed on payment of costs. The affidavit on which the rule was obtained, stated, that the application was made by the bail "at their own expense and for their *own* indemnity."

*Hughes* shewed cause, and objected that the affidavit was insufficient. That the rule 59 Geo. 3 required that the affidavit should state that the application was made for their "only" indemnity, and cited *Price's Exchequer Practice*, Appendix, 157, where the form was "for their *sole* indemnity." He also referred to *Rex v. The Sheriff of Surrey*, in a cause of *Weston v. Woods*(a), where

(a) *Ante*, 581.

**Lord Lyndhurst**, C. B., said, that it was better to adhere to the strict form. He submitted, that if the Court were to make the rule absolute, it would only be upon the terms of the bail-bond standing as a security. [Parke, B.—As the plaintiff has not declared *de bene esse*, can he insist on the bail-bond standing as a security?]

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**Addison, contrd.**—The word “own” is equivalent to the word “only,” which is the word used in the rule. Besides, the rule of the 59 Geo. 3, is a rule of the King’s Bench, and not of this Court. [Parke, B.—But it has been adopted as the practice of this Court.] The Court, at all events, will not order the bail-bond to stand as a security, because, according to rule 11, M. T., 3 Will. 4, the defendant not being in actual custody, the plaintiff might have declared *de bene esse*. And it is expressly provided in rule 5, H. T., 2 Will. 4, that the bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*.

**Lord ABINGER**, C.B.—The plaintiff, not having declared *de bene esse*, has no right to insist on the bail-bond standing as a security. The affidavit of the bail is, that the application is made “at their own expense, and for their own indemnity,” which is irregular. The rule, however, may be enlarged, in order that the affidavit may be amended, the defendant undertaking to put the plaintiff in the same situation.

Rule accordingly.

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1835.*

CARR and Others, Assignees of ANTHONY CLAPHAM, a Bankrupt, v. GEORGE BURDISS and GEORGE BRUMELL

Where the defendants claimed title to certain goods under an assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs:—

*Held*, that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud.

Trover by assignees of a bankrupt, for certain goods, &c., in the possession of the bankrupt as his property at the time of the bankruptcy, and converted by the defendants since the bankruptcy. Plea—

that, before the bankruptcy, the bankrupt assigned and conveyed the goods to the defendants by deed, and that before the bankruptcy they took possession thereof, and kept and retained such possession. Replication—that the defendants did not take possession of the goods before the bankruptcy: on which issue was joined. After a verdict found for the plaintiffs on that issue:—*Held*, that the issue was an immaterial one; and that the assignment, being a transfer of personal property, was sufficient of itself to convey it without possession, the want of which only amounted to evidence of fraud.

*Quare*, whether the payment of a country bank note to a creditor, with the intention of giving him a fraudulent preference, is an act of bankruptcy within the 6 Geo. 4, c. 16, s. 3.

(a) Vide ante, 443.

*leash* did not amount to an act of bankruptcy, and the jury, under his direction, found a verdict for the plaintiffs for 12,889*l. 8s. 3d.*, the amount of the goods and chattels, exclusive of the fixtures on the premises. In Michaelmas Term last,

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*Cresswell* moved for a rule to shew cause why there should not be a new trial, or why the judgment should not be entered for the defendants *non obstante veredicto*, or why the judgment should not be arrested. The first count of the declaration stated the goods to be the property of the bankrupt at the time of his bankruptcy; and the second count stated the property to be in the assignees. The first plea was that *Anthony Clapham* did not become bankrupt. Several other pleas were pleaded, but the fourth plea, which was pleaded to the whole declaration, is alone material. That plea alleged, that, by a deed of assignment, dated the 8th of July, 1833, *Anthony Clapham* assigned the goods to the defendants; and that before the bankruptcy they took possession of the said goods and chattels so conveyed and assigned to them, and by virtue thereof thence continually kept and retained possession thereof. To this plea the plaintiffs replied, that the defendants did not take possession of the goods before the bankruptcy.

*First*, the deed of assignment was improperly admitted in evidence, the attesting witness not having been called to prove its execution. It was said that it was not necessary to prove the execution, because the defendants produced the deed, and claimed a title under it; but this case is not governed by the ordinary rule, because the plaintiffs impugned and disputed the validity of the deed. The rule, that the production of a deed by one party relieves the party calling for it from proving the execution has considerably varied. The general rule laid down

*Exch. of Pleas.*, in *Rex v. Middlesex* (*a*), that a deed coming out of the hands of the opposite party, after notice to produce it, must *prima facie* be taken to be duly executed, and may be read in evidence without proof of the execution, was overruled in the case of *Gordon v. Secretan* (*b*). Undoubtedly in *Doe v. Heming* (*c*), where the attorney for the lessor of the plaintiff in an action of ejectment obtained from one of the defendants (the tenant in possession) a lease of the premises granted to him for a term not then expired, it was held that he thereby recognised it as a valid deed, and that when produced in pursuance of notice from the defendants, it might be read in evidence without proof of its execution. And so in *Pearce v. Hooper* (*d*), it was held, that where a party claims a beneficial estate under a deed, and produces it under a notice, he is not entitled to insist on the execution being proved. But it has never been decided that a party calling for a deed, for the purpose of impugning it, has a right to have it read without proving the execution, because the party producing it derives a beneficial interest under it. In this case the plaintiffs called for the deed for the purpose of shewing that it was a fraud. [Lord Lyndhurst, C. B.—You say that it is a good deed, and well executed; it cannot then be necessary to produce the witness. I do not think that the object which the parties have in calling for its production can make any difference, if the party producing it takes an interest under it. The plaintiffs do not seek to invalidate the deed in respect of its execution. Parke, B.—The rule is, that a party claiming an interest under a deed, by calling for its production, affirms its due execution. In this case the defendants claiming an interest under the deed, and keeping it, and taking the goods under it, have admitted its execution. If the deed had been given up before the

(*a*) 2 T. R. 41.

& Ryl. 15.

(*b*) 8 East, 548.

(*d*) 3 Taunt. 60.

(*c*) 6 B. & Cress. 28; 9 Dowl.

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action, the case might have been different (*a*). In this case both parties agree on the fact of execution.] But not on the circumstances under which the deed was executed. There is no case in which a deed has been allowed to be read in evidence without proof of its execution by a party seeking to invalidate it. It is only allowed in cases where a party seeks to shew that something passed to him by the deed.

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*Secondly*—Assuming that the deed was not an act of bankruptcy, that point having been already decided (*b*), the property in the goods was transferred by it, and vested in the defendants. The main question arises on the special plea that the defendants took possession of the goods before the bankruptcy. The plaintiffs relied on an act of bankruptcy on the morning of the 8th of January, by the payment to *Dagleish*; but although the jury found that the payment was made voluntarily, yet that is not an act of bankruptcy within the meaning of the 6 Geo. 4, c. 16, s. 3. Money is mentioned in the first part of the third section, but is omitted in the latter part, as if the legislature intended that the payment of money to a creditor should not amount to an act of bankruptcy. [*Parke, B.*—In *Cumming v. Bailey* (*c*), a fraudulent delivery of a bill of exchange was held to be within the terms of that section.] This is not a fraudulent gift, delivery, or transfer of any goods and chattels, as mentioned in the act; for a sum of money cannot be construed to be either goods or chattels. In *Bevan v. Nunn* (*d*), the Court of Common Pleas appear to have been of opinion, that the payment of a debt to a creditor by way of preference, is not an act of bankruptcy. *Thirdly*—But at all events the defendants are entitled to have judgment entered for them on the fourth plea, because an immaterial issue has

(*a*) See *Vacher v. Cocks*, 1 B. & Adol. 145.

(*c*) 6 Bing. 363; 4 M. & P. 36.

(*b*) *Vide ante*, 443.

(*d*) 2 Moo. & Scott, 138; 9

Bing. 112.

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been taken by the plaintiffs, and the plea contains a sufficient answer without the fact on which the issue has been taken. If the bankrupt assigned his effects to the defendants, it is unimportant whether they took possession of them or not, as the property vested in them by the assignment, and that is a sufficient answer to the plaintiffs' claim. At all events, the plaintiffs were not entitled to judgment, and therefore the judgment must be arrested. If, however, the Court should be of opinion, that the issue was material, then the verdict was against the evidence in the cause.

The Court granted a rule on the two last points, but refused a rule on the reception of the deed in evidence, without calling the attesting witness.

*F. Pollock, Blackburne, and Wightman*, now showed cause.—*First*, the transaction of the 8th of January, by the payment to *Dagleish*, being a fraudulent preference, was an act of bankruptcy. It was decided in *Beevor v. Nunn*, that a transfer of goods in satisfaction of a debt made voluntarily, and in contemplation of bankruptcy, is an act of bankruptcy. Now, can there be any difference in principle between that and the payment of a sum of money? The matter delivered in this case was a country bank note, and there is no difference between that and the delivery of a bill of exchange; and the delivery of a bill of exchange has been determined to be within the terms of this section. *Cumming v. Bailey* (*a*). Lord C. J. *Tindal*, in the conclusion of his judgment in that case, says: “Indeed, it would be a very narrow construction of the act, to hold that a banker, whose most valuable property often consists of bills and notes, could not commit an act of bankruptcy by a fraudulent transfer of them.” A note payable on demand clearly comes within the description

of goods and chattels. And Mr. Justice Park says in that case, that, "under all the bankrupt statutes, *goods and chattels* have been held to include bills of exchange; and seeing that a large portion of the property of bankers must consist of such instruments, it would be absurd to hold the contrary." And he adds, that this point was expressly decided in *Hornblower v. Proud* (a). It is clear, that if a man having a hundred guineas in a bag, sent it voluntarily to a creditor by way of preference, it would constitute an act of bankruptcy. Wherever trover would be maintainable by the assignees to recover the property transferred, the fraudulent transfer of such property will constitute an act of bankruptcy; and trover will lie for money where it can be identified. In this case, trover would clearly have been maintainable by the assignees, to recover back the money. *Secondly*, the issue joined on the fourth plea, and upon which a verdict was obtained, was not an immaterial issue. The averment of possession in the plea is not immaterial, and therefore the issue cannot be so. That plea is pleaded to the whole declaration, in which the assignees alleged the possession to have been in the bankrupt; in answer to which, the defendants pleaded that *they were in possession*. That is a direct traverse: for the fact of the bankrupt being in the reputed ownership of the goods, would be inconsistent with the plea. [Parke, B.—May not both be in possession? Is it necessarily inconsistent that they should both be in possession? The bankrupt might be residing in the house, and in the apparent ownership of the goods, and at the same time the defendants, with reference to him, might be also in possession.] The term "possession," means exclusive possession, and it is in that sense that the term is used in the pleadings. [Parke, B.—The plea is undoubtedly bad, as amounting to the general issue; it ought to have been a traverse of the property. It would

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*Exch. of Pleas,* have been bad on demurrer, but is it not good now?] But taking it to be a good plea, the averment of possession was necessary to make the plea good, because the conveyance alone would not be sufficient. Even if there had been an assignment long before the bankruptcy; yet, if the defendants were not in possession under it, the assignees would be entitled to the goods. [Alderson, B.—Is it not enough for the defendants to shew that the bankrupt has conveyed this property to them?] Supposing that the Court should be of opinion that the issue is an immaterial one, they will award a repleader, and not give judgment for the defendants.

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*Cresswell* (with whom were *Ingham* and *W. H. Watson*), contra.—The plea was a sufficient answer without the allegation, that the defendants became possessed of the goods. The plaintiffs have to make out their property in and right to the possession of the goods. The plaintiffs take only the rights which the bankrupt had, and the bankrupt had no property in the goods, as he had disposed of all his interest in them long before the bankruptcy. The bankrupt's continuing in possession after the assignment, is not inconsistent with the interest of the defendants. *Kingsbury v. Collins* (a). (He was then stopped by the Court.)

PARKER, B.—There is some doubt, whether the allegation of possession in the plea was intended to aver an exclusive possession by the defendants, and thereby to exclude the case of a reputed ownership by the bankrupt, or not; though the impression on my mind is, that the former was not the proper construction. This being a transfer of personal property, the assignment was of itself sufficient to convey it without possession; the want of

possession was only evidence of fraud (a), and consequently the issue was an immaterial one.

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The Court granted a new trial without costs, giving the plaintiffs leave to amend on payment of costs.

(a) *Martindale v. Booth*, 3 B. & Ad. 498; *Shepherd's Touchstone*, 224.



### ANGERSTEIN v. HANDSON.

**A**SSUMPSIT. The declaration stated, that the defendant theretofore, to wit, on the 6th April, 1831, became and was tenant to the plaintiff of a certain farm and lands, called *Otley*, consisting (amongst other things) of divers, to wit, 600 acres of arable land, with the appurtenances, situate &c., and in consideration thereof, he the defendant, on the day and year aforesaid, promised the plaintiff to use, cultivate, and manage the said farm and lands with the appurtenances during the continuance of the said tenancy, according to the course of good husbandry and the custom of the country where the said farm and lands were and are so situate as aforesaid. And the plaintiff avers, that the defendant was and continued tenant to him of the said farm and lands, with the appurtenances, for a long space of time, to wit, from the day and year aforesaid, until and upon the day of the commencement of this suit. And the plaintiff further saith, that

In an action brought by a landlord against a tenant for not properly cultivating a farm, the declaration alleged that the defendant undertook to cultivate and manage the farm and lands according to the course of good husbandry and the custom of the country where the farm was situate; and then went on to aver, that, according to the course of good husbandry and the custom of the country, the defendant ought to have had about one-half only of the arable lands

in corn, one-fourth in seeds, and the remaining fourth in turnips or fallow; and alleged as a breach, that the defendant had more than one-half in corn, &c. &c. The defendant pleaded, traversing the custom as alleged in the declaration. At the trial, the jury found that the custom was not as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighbourhood:—*Held*, that the plaintiff had tied himself up to the precise custom as alleged in the declaration, and, having failed to prove it, was not entitled to recover.

*Exch. of Pleas,* according to the course of good husbandry and the custom of the country where the said farm and lands were and are so situate as aforesaid, the defendant before and at the time of the commencement of this suit ought to have had about one-half only of the said arable lands in corn, and one-fourth part thereof in seeds, and the remaining one-fourth part thereof in turnips or to have been fallow, in each and every year of the said tenancy; yet, the defendant, well knowing the premises, but disregarding his promise, and contriving &c. to injure the plaintiff in this behalf, after the making of his said promise, and during the continuance of the said tenancy, to wit, before and at the time of the commencement of this suit, had divers, to wit, 500 acres of the arable land in corn, the same being much more than one-half of the said arable land, contrary to the course of good husbandry, and the custom of the country where the said farms and lands were and are so situate as aforesaid, and the promise of the said defendant so by him made as aforesaid. And the plaintiff further saith, that the defendant further disregarding &c., and further contriving &c., after the making of his said promise, and during the continuance of the said tenancy, to wit, &c., wrongfully and unjustly omitted and neglected to have one-fourth or any part whatever of the said arable land in seeds, contrary to the course of good husbandry and the custom of the country where the said farm and lands were and are so situate as aforesaid, and the promise of him the defendant so made as aforesaid. And the plaintiff further saith, that the defendant, further disregarding &c., and further contriving &c., after the making of his said promise, and during the continuance of the said tenancy, to wit, before &c. wrongfully and unjustly suffered and permitted only a small portion, and much less, to wit, 100 acres less than one-fourth of the said arable land, to be in fallow or turnips, contrary to the course of good husbandry and the

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custom of the country where the said farm and lands were and are so situate as aforesaid, and the promise of the defendant so by him made as aforesaid. By means whereof &c. To this declaration the defendant pleaded as follows:—The defendant says, that, though true it is that he promised in manner and form as the plaintiff hath above alleged; nevertheless, for plea in this behalf the defendant says, that, according to the course of good husbandry and the custom of the country where the said farm and lands were and are so situate as aforesaid, it was not the duty of the defendant to have had about one-half only of the said arable land in corn, and one-fourth part thereof in seeds, and the remaining one-fourth part thereof in turnips or to have been fallow, in each and every year of the said tenancy, in manner and form as the plaintiff hath above alleged. And of this the defendant puts himself upon the country, &c. At the trial, before Park, J., at the last Summer Assizes for the county of *Lincoln*, the jury found that the custom was not as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighbourhood. The learned Judge was of opinion that the issue ought to be found for the defendant; but, in order to save the expense of another trial, should the Court be of a contrary opinion, he directed the jury to find a verdict for the plaintiff, which they accordingly did for 450*l.* The learned Judge having given the defendant leave to move to enter a non-suit, *Goulburn*, Serjt., in Michaelmas Term last, obtained a rule accordingly; and now

*N. R. Clarke shewed cause.—The issue raised by the second plea is wholly immaterial, and, therefore, the plaintiff is entitled to judgment. The issue is joined on the custom of the country, which is not the material part. The issue ought to have been on the mismanagement of the farm, and not on the custom of the country.*

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And although the plaintiff has in his declaration alleged that the defendant cultivated the farm contrary to good husbandry and the custom of the country, it was not necessary to prove that part of the averment which states it to be contrary to the custom of the country. It is sufficient to shew that it was contrary to good husbandry. That was determined in *Legh v. Hewitt* (a), which was an action against a tenant, on promises that he would occupy a farm in a good and husbandlike manner, according to the custom of the country; and it was held, that an allegation, that he had treated the estate contrary to good husbandry and the custom of the country, was proved by shewing that he had treated it contrary to the prevalent course of good husbandry in that neighbourhood, as, by tilling half his farm at once, when no other farmer tilled more than a third, and many tilled only a fourth; and that it was not necessary to shew any precise definite custom or usage in respect to the quantity tilled. There the first breach assigned was, that the defendant, contrary to good husbandry and the custom of the country, converted into tillage five acres of grass land, parcel of the premises, which, according to good husbandry and the custom of the country, ought not to have been ploughed up. The second was, that, according to good husbandry and the custom of the country, the defendant, as tenant, ought not to have had, at any one time, more than one-third part of the premises in tillage; yet that he wrongfully kept a larger part, to wit, one-half, in tillage, contrary to good husbandry and the custom of the country. In that case, the jury having found for the defendant on the ground that no custom had been proved, *Gibbs*, in argument, in support of a rule for a new trial, said, that in this form of declaring, it was not necessary to prove that any known certain custom or course of husbandry existed in that part of the

country; that, in strictness, there could be no legal *custom* as applicable to such a subject; but that, taking the allegation in its popular and lax sense, and according to the general understanding of mankind on the subject, it was sufficient to prove that the defendant's treatment of the farm was against the known good rules and prevalent course of good husbandry as generally practised in that country, with all its modifications and variations. He further said, that the promise of cultivating the farm, *according to the custom of the country*, was laid with reference to and explanatory of the promise to use and occupy *in a good and husbandlike manner*; and that it was not laid as two distinct allegations, to occupy "in a husbandlike manner," and "according to the custom," &c. And Lord *Ellenborough*, C. J., said: "The jury have found a verdict for the defendant, under an impression that the words in the declaration, '*according to the custom of the country*,' require a more strict and specific proof, than, I think, they demand. The words are, that the defendant promised to use and occupy the premises in a good and husbandlike manner, according to the custom of the country where the said premises lie; by which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the land lies. From the subject matter of the contract, it is evident that the word *custom*, as here used, cannot mean a *custom* in the strict legal signification of the word; for that must be taken with reference to some defined limit or space, which is essential to every *custom* properly so called. But no particular place is here assigned to it, nor is it capable of being so applied. What shall be considered in farming as *a good husbandlike manner*, must vary exceedingly, according to soil, climate, and situation; and therefore *the custom of the country* with reference to good husbandry must be applied to the approved habits of husbandry

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in the neighbourhood, under circumstances of the like nature." Mr. Justice *Lawrence* also says, "It has been pressed in argument, that in order to maintain the declaration, it was incumbent on the plaintiff to prove a definite known custom or course of husbandry in that country, and that the estate was not treated by the defendant according to that known custom; but that was not necessary: it was sufficient to shew what was the prevalent course of good management there, which was the course of management according to good husbandry which the defendant undertook to observe; and by proving that the estate was not so managed, the plaintiff made out what he undertook to do, namely, that the estate was treated in a manner *contrary to good husbandry and the custom of the country.*" And *Le Blanc*, J., says, "The jury went upon the ground that the words '*custom* of the country' were to be taken in a precise sense, as denoting a certain known uniform course of husbandry there established; but I think the words of the declaration altogether mean no more than if the promise had been laid to be simply to manage the farm in a good and husbandlike manner, which must always be taken with reference to the usage and mode of cultivation in that part of the country where the land lies." And he adds, "Here it was proved that no custom of the country authorized the manner in which the defendant had treated this estate, and that was sufficient to make out the allegation that he had managed it contrary to good husbandry and the custom of the country." If this had been an allegation of a *custom* in the strict legal sense of the word, then it is admitted that it would have been material, and must have been proved. But it is submitted that the decision above cited shews that it was not necessary to prove the averment of the custom, and therefore the issue taken upon it was immaterial. Here the jury found that there was no such custom as alleged, but that the defendant had treated the

lands contrary to good husbandry, which it is submitted entitled the plaintiff to a verdict. It was no defence to deny the custom, as that was no answer to the breaches assigned. The substantial breach assigned is the not managing the farm according to good husbandry. [Parke, B.—The defendant says in substance, I do not deny the breaches, if that is the custom of the country which the plaintiff alleges.] It is submitted, that that is not sufficient. Having admitted the promise, the defendant could only say, that he had performed it. It is no answer to say that the plaintiff has not stated the custom correctly, as that was not material. This, therefore, is an immaterial issue; and it is not sufficient for the defendant to say that this was not the custom. That could not be made material, unless the defendant in his plea had alleged what the custom was, and an express issue had been taken upon it. A repleader is only awarded where the matter would have been a good defence if well pleaded; but if it would not be a good defence when well pleaded, then as the awarding of the repleader would not mend the case, the Court will then give judgment for the plaintiff *non obstante veredicto* (a). *Rex v. Philips* (b). All the defendant's witnesses admitted on cross-examination, that the defendant had not managed the lands according to the course of good husbandry in the country. [Lord Abinger, C. B.—We wish to look at the evidence before we come to a conclusion in this case. Suppose, on reading the notes, it should be found that a custom was proved different from that stated in the declaration, and that the defendant had followed the one not stated, the question would be whether that would form a good defence on the merits. But if it should appear that a custom different from

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(a) Bacon's Abr. Tit. Repleader, Vol. 5, 453.

(b) 1 Burr. 292.

*Exch. of Pleas,* the one stated prevailed, and that the defendant had followed neither the one nor the other, then the question would be whether the plaintiff would not be entitled to a verdict on the merits.]

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*Goulburn*, Serjt., and *Whitehurst*, contra, were stopped by the Court.

*Cur. adv. vult.*

The judgment of the Court was afterwards delivered by

PARKE, B.—This was an action brought by the plaintiff, the landlord, against the defendant, the farmer, for cultivating a farm (which the defendant held of the plaintiff) contrary to good husbandry and the custom of the country; and the declaration contained an allegation that the defendant undertook to cultivate and manage the farm and lands according to the course of good husbandry and the custom of the country where the farm and lands were situate; that is, in substance, that he undertook to manage the farm according to the prevailing course of good husbandry in the neighbourhood. The declaration then went on to aver that according to the course of good husbandry and the custom of the country the defendant ought to have had about one-half only of the arable lands in corn, one-fourth part in seeds, and the remaining fourth part in turnips or fallow. That was the averment of the custom. The declaration then averred a breach of the custom, that the defendant had more than one-half of the arable lands in corn, and had not one-fourth in seeds, and had a less quantity than one-fourth in fallow or turnips. To this declaration the defendant pleaded, that, by the course of good husbandry and the custom of the country, it was not the duty of the defendant to have had about one-half only of the arable land in corn, and one-fourth part thereof in seeds, and the remaining fourth part

thereof in turnips or fallow: that is, traversing the custom in the same terms as it is alleged in the declaration. On the trial, it appeared that no such custom existed, but that there was a different custom. The learned Judge was of opinion that the issue ought to be found for the defendant, and we agree with him in that opinion. The plaintiff, by the form of his declaration, has made the precise custom material. He might have declared so as not to have tied himself up to this precise custom. He might have declared generally that the defendant undertook to manage the farm according to good husbandry and the custom of the country, and then alleged as a breach that he had not so managed and cultivated, in this, that he had more land in corn, &c. than he ought to have had. The custom then would have been left more at large. By pleading as he has done, he has tied himself up to the precise custom as alleged in the declaration, and having failed to prove it, we think he was not entitled to recover.

*Clarke* applied for leave to amend, on payment of the costs of the first trial and of the amendment.

*Per Curiam*.—We think that the proper course will be, not that a nonsuit should be entered, but that there should be a

Rule absolute for a new trial on payment of costs, the plaintiff having leave to amend on payment of costs.

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## EASTON v. PRATCHETT.

In an action of *assumpsit* on a bill of exchange by indorsee against indorser, the defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he, the defendant, had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement.

Issue being taken on this plea, a verdict was found for the defendant. On a motion for judgment for the plaintiff, *non obstante verdicto*:—*Held*, that the plea was sufficient, after verdict, but that it would have been bad on demurrer.

**A**SSUMPSIT on a bill of exchange for 100*l.* drawn by the defendant in his own favour upon one *Peter Maddocks*, and indorsed by the defendant to the plaintiff. The *second* count was upon an account stated. Pleas—to the *first* count, that the defendant indorsed the said bill to the plaintiff without having or receiving any value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant has not at any time had or received any value or consideration whatsoever for or in respect of such indorsement; *secondly*, to the *first* count, payment by the defendant; *thirdly*, to the *first* count, payment of 50*l.* by *P. Maddocks*, and of the residue by the defendant, and *non assumpsit* to the account stated. Replication to the first plea, that the defendant, at the time of the said indorsing of the said bill, had and received from the plaintiff a good and sufficient consideration for and in respect of the said indorsement, concluding to the country. To the second plea the plaintiff replied by denying the payment; and to the third plea the plaintiff replied by denying the payment of the residue of the bill by the defendant.

At the trial before *Gurney*, B., at the last *Summer Assizes* for the county of *Lancaster*, the jury found a verdict for the defendant on the first and last issues, and for the plaintiff on the second and third, without assigning any damages.

*Alexander* moved in *Michaelmas Term* for a new trial, on the ground of the reception of improper evidence, and for judgment on the first count *non obstante* the verdict on the first plea. The Court, after taking time to con-

sider, refused the rule on the first point, it appearing that the evidence, whether rightly or wrongly received, did not affect the issues raised on the record; but they granted a rule for entering judgment *non obstante veredicto* for the plaintiff.

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*Crompton* shewed cause.—*First*, the plea would have been good on demurrer; *secondly*, if not, it is cured by the verdict; *thirdly*, if bad after verdict, the course would be to award a repleader; and, *fourthly*, no judgment *non obstante* can be given, as the jury who tried the issues have not assessed any damages. *First*, it is submitted, that the plea would be good, either on special, or, at all events, on general demurrer. It will be contended that the fact of there being a consideration is not sufficiently negatived by the averment of the indorsement being without the defendant's having or receiving any value or consideration; but that expression is equivalent to the allegation that the indorsement was without value or consideration. If the words "receiving value" were not sufficient, the words without "having consideration" are clearly equivalent to saying that there was no consideration. It will be said that the consideration might be the debt of a third person; but if there were that consideration, the plea which says that the defendant indorsed without having any value or consideration, would not be true. If he had the consideration of the debt of a third person, he did not indorse the bill without having any consideration. The fallacy lies in supposing that consideration means the subject matter of the consideration, and that the word "having" means having actually and tangibly something corporeal. These words, however, do not import that the defendant had hold of any actual corporeal property; they do not mean that he had the money in his pocket. It is correctly said, that

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## EASTON v. PRATCHETT.

In an action of *assumpsit* on a bill of exchange for 100*l.* drawn by the defendant in his own favour upon one *Peter Maddocks*, and indorsed by the defendant to the plaintiff. The *second* count was upon an account stated. Pleas—to the *first* count, that the defendant indorsed the said bill to the plaintiff without having or receiving any value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant has not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. Issue being taken on this plea, a verdict was found for the defendant. On a motion for judgment for the plaintiff, *non obstante verdicto*:—*Held*, that the plea was sufficient, after verdict, but that it would have been bad on demurrer.

**A**SSUMPSIT on a bill of exchange for 100*l.* drawn by the defendant in his own favour upon one *Peter Maddocks*, and indorsed by the defendant to the plaintiff. The *second* count was upon an account stated. Pleas—to the *first* count, that the defendant indorsed the said bill to the plaintiff without having or receiving any value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant has not at any time had or received any value or consideration whatsoever for or in respect of such indorsement; *secondly*, to the *first* count, payment by the defendant; *thirdly*, to the *first* count, payment of 50*l.* by *P. Maddocks*, and of the residue by the defendant, and *non assumpsit* to the account stated. Replication to the first plea, that the defendant, at the time of the said indorsing of the said bill, had and received from the plaintiff a good and sufficient consideration for and in respect of the said indorsement, concluding to the country. To the second plea the plaintiff replied by denying the payment; and to the third plea the plaintiff replied by denying the payment of the residue of the bill by the defendant.

At the trial before *Gurney*, B., at the last *Summer Assizes* for the county of *Lancaster*, the jury found a verdict for the defendant on the first and last issues, and for the plaintiff on the second and third, without assigning any damages.

*Alexander* moved in *Michaelmas Term* for a new trial, on the ground of the reception of improper evidence, and for judgment on the first count *non obstante* the verdict on the first plea. The Court, after taking time to con-

sider, refused the rule on the first point, it appearing that the evidence, whether rightly or wrongly received, did not affect the issues raised on the record; but they granted a rule for entering judgment *non obstante veredicto* for the plaintiff.

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*Crompton* shewed cause.—*First*, the plea would have been good on demurrer; *secondly*, if not, it is cured by the verdict; *thirdly*, if bad after verdict, the course would be to award a repleader; and, *fourthly*, no judgment *non obstante* can be given, as the jury who tried the issues have not assessed any damages. *First*, it is submitted, that the plea would be good, either on special, or, at all events, on general demurrer. It will be contended that the fact of there being a consideration is not sufficiently negatived by the averment of the indorsement being without the defendant's having or receiving any value or consideration; but that expression is equivalent to the allegation that the indorsement was without value or consideration. If the words "receiving value" were not sufficient, the words without "having consideration" are clearly equivalent to saying that there was no consideration. It will be said that the consideration might be the debt of a third person; but if there were that consideration, the plea which says that the defendant indorsed without having any value or consideration, would not be true. If he had the consideration of the debt of a third person, he did not indorse the bill without having any consideration. The fallacy lies in supposing that consideration means the subject matter of the consideration, and that the word "having" means having actually and tangibly something corporeal. These words, however, do not import that the defendant had hold of any actual corporeal property; they do not mean that he had the money in his pocket. It is correctly said, that

*Ech. of Pleas,* there is the consideration of natural love and affection.  
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*EASTON v.  
PRATCHETT.*

The word "consideration" is rather used like the words inducement or excuse, and it would not be improper to say that a man had an excuse for not performing an act, or had an inducement for the performance of an act. So it might be said correctly, that he had not the consideration of the debt of a third person. Besides, a man who indorses a bill for the debt of a third person, has the consideration of the forbearance to sue, or, at all events, of the suspension of the right of suing. The Judge at the trial was bound to receive evidence of the fact, that there was the consideration of the debt of a third person, and in point of fact, such evidence was received in this very case. [Parke, B.—The plea is not inconsistent with the fact, that the bill was indorsed over by the defendant to the plaintiff as a gift. It would be insufficient on that ground, if the cases are correct, which tend to shew that an action will lie on such indorsement. The latest decision (*a*) is against such an action lying against the giver by the person to whom such indorsement is made; but the authorities are contradictory, and the law is, perhaps, not to be considered as settled on that point. It was certainly, however, not intended by the new rules that any such general plea of want of consideration should be allowed. It is directed, that the defendant shall plead that the bill was drawn, &c. by way of accommodation, &c. The only question is, whether the plea is good after verdict.] In the case referred to, the decision of the Court was, that a gift was not a sufficient consideration by means of which an action would lie against the giver on such an instrument, and the cause was sent down for further inquiry on the other point in the case. The Court, however, in that case only considered the question as to whether the grati-

(a) *Holliday v. Atkinson*, 5 B. & C. 501; 8 D. & R. 163.

tude or the affection was a sufficient consideration; they treated it as a question whether a consideration existed; and, even if it were a sufficient consideration, the fact of such consideration existing is sufficiently negatived by the plea. The argument that the plea is insufficient, on the ground of not excluding the existence of a gift, is not tenable, for it implies that a simple contract may exist which can be binding without a consideration. It is perfectly clear, that, by the law of England, no simple contract without a consideration can be binding, so as to give a right of action. It is true, that bills of exchange differ from other simple contracts in this respect, that, in the case of bills of exchange, the consideration is implied, and need not be stated in the declaration. It must, however, exist in point of fact. It is true also, that a consideration will be sufficient in the case of a bill of exchange, which is not sufficient in the case of simple contracts; but in every case some consideration must exist, and if it appears on the record that no consideration exists for a simple contract, the defendant must have judgment. In an action where the consideration is expressly averred, it is allowable to traverse it; and, perhaps, this plea may be good as an informal traverse of the implied allegation of consideration. It is submitted that the new rules only intended to prevent the consideration being put in issue by the plea of *non assumpsit*, and that the right to deny the consideration remains as before, though such fact must now be traversed specially. Where the special matter is inconsistent with a material fact alleged or necessarily implied in the declaration, there might be a difficulty as to pleading such special matter without traversing the inconsistent matter. [Parke, B.—It was intended by the new rules to compel the defendant in such case to plead the special matter affirmatively. Here you ought to have pleaded that the bill was drawn by the defendant upon the third person, and indorsed over by the defendant to the

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*Eccles. of Pleas,* plaintiff, in order to give him the property in the bill and the right of action against the third person, but that it was intended that the defendant should not be liable on the bill to the plaintiff. The question is, whether the plea is good in this stage of the proceedings.] *Secondly*, the plea is good after verdict. If informal under the new rules, the plea would only be bad on demurrer. If it appear that there were no consideration, the plea is good in substance. Any defect as to the mode of excluding the fact of consideration, is at most only an ambiguity, and an ambiguous expression is cured by verdict, or by pleading over, and must be in such case taken in the sense which will support the verdict or prior pleading. *Lord Huntingtower v. Gardiner* (a), *Hobson v. Middleton* (b). After verdict, the Court is bound to make any reasonable intendment to sustain the verdict, as the mistake is merely in setting out the defence defectively. *Weston v. Mason* (c), *Cobb v. Bryan* (d), *Bac. Ab. Pleading*, M. 3. The statute of Hen. 8, c. 20, which is very large in its operation, would also cure the defect in this plea, as it is at most but a mispleading. *Thirdly*, this is rather a case for a repleader, which is not prayed for, than a case in which the Court would give judgment *non obstante*, which is never granted but in a very clear case, and never against the merits (e). *Fourthly*, as no damages have been assessed by the jury who tried the issue, judgment *non obstante* would be erroneous. That was expressly decided in *Clement v. Lewis* (f). The defendant has a right to have the damages assessed by the jury who try the issue, and the defect cannot be cured by a writ of inquiry. [Parke, B.—It is said that there may be

(a) 1 B. &amp; C. 297.

(d) 3 Bos. &amp; Pull. 348.

(b) 6 B. &amp; C. 303; 9 Dowl. &amp; Ryl. 249.

(e) Tidd's Pract. 962; 2 Saunders, 319.

(c) 3 Burr. 1725.

(f) 3 B. &amp; B. 297.

a writ of inquiry, where there is only one issue.] The reason given for the rule is, that on an inquiry of damages no attaint lay, and therefore the rule was confined to cases where an attaint lay. Thus in debt, where the damages were incidental and no attaint lay in respect of them, the omission might be supplied by writ of inquiry; but where the damages are the gist of the action, it cannot.

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*Alexander and Cowling, contrà.*—The plea in question is no answer to the first count of the declaration, and the plaintiff therefore is entitled to judgment, notwithstanding the verdict on that plea. The words having and receiving value and consideration must mean some pecuniary, corporeal, or tangible consideration, such as money or goods; and, if so, many cases in which the plaintiff would be entitled to recover on the bill are not excluded. Thus, the plea does not exclude an indorsement by way of gift, which the current of authorities (*a*) shew to be sufficient to give a right of action on such negotiable instrument. A contract in writing may, in such case, be sufficient without there being any consideration; *Pillans v. Van Mierop* (*b*); and though that case was doubted in *Rann v. Hughes* (*c*), it was supported in *Johnson v. Collings* (*d*) and *Clarke v. Cock* (*e*). The case of a bill accepted for the accommodation of the drawer without consideration, and indorsed over to the plaintiff after it became due, is not excluded by this plea; and it was held in *Charles v. Marsden* (*f*) that the plaintiff might recover under such circumstances. [*Parke, B.*—The plea there might have been an answer if it had shewn that the plaintiff had given no consideration

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| ( <i>a</i> ) <i>Tate v. Hibbert</i> , 2 Ves. jun. 111; and <i>Seton v. Seton</i> , 2 Bro. Cha. Ca. 610. ( <i>b</i> ) 3 Burr. 1663. | ( <i>c</i> ) 7 T. R. 350, note. ( <i>d</i> ) 1 East, 98. ( <i>e</i> ) 4 East, 57. ( <i>f</i> ) 1 Taunton, 224. |
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*Exch. of Pleas,* for the bill, but that could not be inferred from the mere fact of its being indorsed over after it became due.] The plea would be bad even if the words "had and received" had been omitted. It must be assumed that the acceptance was for value, and, if so, there is no necessity for any actual consideration moving between the indorser and the plaintiff; the remedy over, which the indorser has against the acceptor, is itself a sufficient consideration for the defendant's promise to pay the plaintiff. There is a sufficient consideration, unless the Court think that if the defendant had handed to the plaintiff the amount of the bill, and retained the bill itself, he could afterwards have recovered that money back from the plaintiff on the insolvency of the acceptor. It is only under such circumstances that want of consideration could be a defence—*per Parke, J.*, in *Stephens v. Wilkinson* (*a*); and it is clear on these pleadings that the defendant could not have recovered it back. It is clear also, from the judgments of *Bayley* and *Vaughan*, Barons, in *Sowerby v. Butcher* (*b*), that there need not be any consideration between the indorser and indorsee under the circumstances in the pleadings. The cases in which it has been held that it is a good defence that there was no consideration, as where the bill was a mere gift, are where the defendants have been the acceptors of bills, and where consequently they had no remedy over; and there is no case extending the same doctrine to indorsers. Again, the words "had and received" vitiate the plea by confining it to cases where some *tangible* consideration has been received, or at all events where some consideration has been received *by the defendant*, and therefore it is consistent with the plea that a consideration may have been received by the acceptor at the defendant's request. If goods be sold on a *guarantie*, there is a sufficient consideration to

(*a*) 2 B. & Ad. 326.

(*b*) 2 C. & M. 368.

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render both the vendee and the surety liable; but the vendee is the only person who "has and receives" the consideration, and against whom an action of *debt* will lie. *Assumpsit* must be brought against the person guaranteeing. So, a forbearance to sue the defendant might possibly be received in evidence under this issue, but the plea is consistent with a forbearance to sue another at the defendant's request. These words make the plea amount only to an averment that there was not such a consideration as would support an action of debt (*a*). Such a plea is justified by no analogy to precedents; a similar case could only formerly arise on a replication to a plea of usury to an action on a bond, or the like, and yet the phrase always was merely that the bond, &c. was given for "good and valuable consideration," omitting the words "had or received." That was the form of the allegation in *Smith v. Dovers* (*b*) and *Hedges v. Sandon* (*c*). It is not necessary that the consideration should be "had or received" by the defendant, but only that it must move from the plaintiff at the defendant's request. If then the plea be bad in substance, it is not cured by verdict; for the verdict only shews that there was no actual consideration between the indorser and indorsee, which was immaterial, and therefore leaves the case in the same situation as if the point arose on general demurrer. The plaintiff also, if the plea be bad, having gained on one issue has a right to the fruits of his verdict, and to judgment *non obstante veredicto* thereon; the Court will not award a repleader since 4 Ann. c. 16, which allowed several pleas, where a plaintiff gains on one of them, unless under special circumstances, *Goodburne v. Bowman* (*d*). If a *venire de novo* be awarded, it can only be to assess damages; *Clement v. Lewis* (*e*); that case, how-

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(*a*) See *Anon.* Hard. 486.

(*b*) 2 Doug. 428.

(*c*) 2 T. R. 439.

(*d*) 9 Bing. 532; 3 M. & Scott,

69, S. C.

(*e*) 3 B. & B. 297; 7 Moo. 200.

*Exch. of Pleas,* ever, was decided on the authority of *Cheyney's case* (a),  
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and went solely on the ground that an attaint would lie  
against the jury for not assessing damages; and, therefore,  
since attaint is abolished by 6 Geo. 4, c. 50, s. 60, proba-  
bly a writ of inquiry would now be awarded.

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*Cur. adv. vult.*

The judgment of the Court was now delivered by—

Lord ABINGER, C. B.—This case came before us on a motion for judgment *non obstante veredicto*. It was an action upon a bill of exchange by the indorsee against the indorser, and the defendant says in his plea that he indorsed the bill without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he has not at any time had any value or consideration whatsoever in respect of such indorsement. The plaintiff replies that the defendant, at the time of the indorsement, had and received a good and sufficient consideration for and in respect of the said indorsement; and upon this issue the jury have found for the defendant, thereby finding that the bill was indorsed by the defendant without his having or receiving any value or consideration. A motion has been made to enter up judgment for the plaintiff, on the ground that this plea is insufficient. The question has been argued before us, and we have considered the subject. We are disposed to think, that the plea would have been bad on special demurrer. It would have been bad before the late regulations as to pleadings, as amounting to the general issue. The new regulations do not justify the form of the plea. It was intended to make it incumbent upon a defendant, to set forth the circumstances under which the bill is sought to be impeached. The plea of the general issue is forbidden by the new rules to be

(a) 10 Co. R. 119 a.

pleaded in an action on a bill of exchange. And the plea of the special matter, which according to the new rules is now to be pleaded, is not to be confined to the effecting the same purpose as a mere notice to prove the consideration. It was intended that the plaintiff should be apprized by the plea of the grounds upon which the defendant objects to the right of recovering upon the bill; as, for example, that it was given for the accommodation of the plaintiff, the *onus* of proving which lies on the defendant; or that it was given upon a consideration which afterwards failed, which in like manner the defendant must prove; or that it was given on a gambling transaction; and various similar cases may be readily suggested. The intention then of these new regulations being to give the plaintiff due notice of the real defence which is to be set up, would manifestly fail if such a general plea as the one in question could be sustained; because the plaintiff would be left in the same state of uncertainty in which he formerly was before these rules of pleading were introduced. We are therefore of opinion, that this would have been a bad plea on special demurrer; but the question now is, whether after verdict it is to be considered by us as a bad plea; and we cannot hold that it is. It is clear that on this issue both parties were at liberty to go into evidence as to the consideration for the indorsement of the bill. It appears, in point of fact, that they did so; for evidence was given upon it on both sides, and the jury have found for the defendant. It is therefore established by the verdict, that the bill was indorsed without consideration; but it has been argued that this plea is bad, because in its language it does not necessarily exclude that species of consideration which does not lie in tangible possession, but is something of a different nature, such as the forbearing to sue, or a guarantie of another person's debt, which are not pecuniary considerations capable of possession; and it is said, that such considerations cannot properly

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*Ech. of Pleas,* be said to be had or received by the defendant. We are  
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of opinion, however, that this objection cannot be sustained.  
Whatever be the nature of the consideration, if it is actually obtained, the party may both in legal and common language be said to have had and received it. If a man is to have credit and it is given to him, he has that for which he stipulates. So, if a bill is given for forbearance, the party may be said to have the consideration, because he actually possesses the benefit of that forbearance. This appears to us to be a sufficient answer to this objection. But it is further contended, that the plea is bad, because it does not exclude the case of the bill having been delivered to the plaintiff by way of gift, that is, that an indorsement may be without consideration; yet if it be intended to be a gift, it will be binding. Supposing it to be true, that such gift is binding, in one sense indeed the indorsement may be said to be without consideration, as it is without pecuniary consideration; but if it can be the subject of an action, it can only be on the ground of there being some consideration, as of favour or affection, or the desire to promote the interests of another. Without any violence to language, the terms used in this plea may so be construed, and that would be a sufficient answer to this objection; but I own that I go further. If a man give money as a gratuity, it cannot be recovered back, because the act is complete; yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing not under seal, can have any binding effect. The law makes no difference between such a promise and a verbal one. There is the same distinction as to a bill of exchange. If a party gives to another a negotiable instrument, on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill; but it is a very different question, whether the giver binds himself by the

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indorsement, so as to make himself liable thereupon to the person to whom he gives it. There is no decision that he does, and there is a strong authority the other way, and the prevailing opinion in the profession is, that a parol promise of a gift, whether verbal or in writing, will not be binding. It appears therefore that the supposition of a gift, which has been made for the purpose of this argument, would not support the action. We are of opinion however, that the plea must be taken to negative the existence of any such consideration, even supposing that it would be sufficient. Upon the whole, we think that the plea must now be considered as alleging that no consideration existed, and that after verdict it cannot be disturbed.

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Rule discharged.

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## EXCHEQUER CHAMBER.

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JANE COCKRANE, Administratrix of JAMES COCKRANE,  
deceased, *v.* PETER FISHER.

*[In error from the Court of Exchequer.]*

THIS was an action of *assumpsit* upon a policy of assurance upon the ship *Cyclops*, to recover the sum of 50*l.*, A policy of insurance contained a warranty "not to sail for British

*North America after the 15th of August.*" The vessel, on the morning of the 15th of *August*, was cleared at the Custom-house of *Dublin*, and ready for sea. She was then lying in the Custom-house Dock, which opens into the river *Liffey*, which forms part of *Dublin* harbour. She was afterwards, on the same day, hauled out of dock and warped down the river *Liffey* about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to *Quebec*, in *North America*. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river, and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail for *Quebec* on the 15th of *August*, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty:—*Held*, that the vessel was in the prosecution of her voyage on the 15th of *August*, and that the warranty not to sail for *British North America* after that day, had been compiled with.

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being the amount of the defendant's subscription to the policy. At the first trial before *Denman*, C. J., at the *Lancaster Summer Assizes*, 1833, a verdict was found for the plaintiff, subject to the opinion of the Court of *Exchequer* upon the following case:—

On the 26th of *February*, 1831, *James Cockrane*, the husband of the plaintiff, caused an insurance to be made on the ship *Cyclops*, of which he was the master, and a part-owner. The policy of assurance, which is of that date, states that *John Dixon*, therein described as agent, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause himself and them and every of them to be insured, lost or not lost, at and from and to any port or ports, place or places, whatsoever and wheresoever, in any trade, for the space of twelve calendar months, commencing on the 27th day of *March*, 1831, and ending on the 26th day of *March*, 1832, both days inclusive, in port, and at sea, at all times, and in all places, and in all services, upon any kind of goods and merchandize, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the *Cyclops*, whereof was master for that present voyage *James Cockrane*, or whomsoever else should go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof was or should be named or called, beginning the adventure upon the said goods or merchandize from the loading thereof aboard the said ship at as above, upon the said ship, &c., and so should continue and endure during her abode there upon the said ship; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandize whatsoever, should be arrived at as aforesaid, upon the said ship, &c., and until she should have moored at anchor twenty-four hours in good safety, and upon the

goods and merchandize until the same should be there discharged and safely landed; and it should be lawful for the said ship, &c., in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to that insurance; the said ship, &c., goods and merchandize, &c., for so much as concerned the assured, by agreement between the assured and assurer in that policy, were and should be valued at 300*l.*, on ship valued at 1800*l.*, on account of Captain *James Cockrane, &c. &c.* And, by a memorandum in the margin of the said policy, *the said ship was warranted not to sail for British North America after the 15th day of August, 1831.*

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The *Cyclops* had arrived in *Dublin* Harbour, from *Quebec*, in *British North America*, about the 1st of *August, 1831*, and on the 10th of *August* was chartered on a voyage back to *Quebec*. The vessel was at that time lying in the Custom-house Dock, and great exertions were made by the master and crew to get her ready for sea on the 15th of *August*, on account of the warranty. On the morning of the 15th, the vessel was cleared at the Custom-house, and was in all respects ready for sea. She was then at the Custom-house Dock, which opens into the river *Liffey*, which is part of *Dublin* Harbour, having on each side of it quays, where goods are constantly landed and discharged; and at half-past two in the afternoon of the 15th of *August*, which was as soon as the tide permitted, she was hauled out of the dock into the river, for the purpose of proceeding on her voyage to *Quebec*. The wind blew strong from the E. S. E., which being right up the river, no sail was or could be hoisted, and it was manifestly impossible for her to get out of the harbour. She was warped down the river, about half a mile, when the tide had ebbed so much that she could not get any further, and, before low water, went aground, as is unavoidable in the *Liffey*. On the following day, when the tide served, the wind continuing foul, she was

*Eck. Chamber,* warped further down the river, when she again took the ground from the falling of the tide, at a place being still ten miles from the mouth of the harbour, and remained until the tide rose on the following day, the 17th, the wind still blowing strong from the E. S. E., and it being impossible to set or use the sails with any advantage, or to proceed to sea with the wind in that direction. Vessels cannot be warped below a place called the *Pigeon-house*, which is about seven miles from the mouth of the harbour. On the 17th, the wind changed to the N. N. W., when they immediately set their sails, and proceeded to sea, and arrived safely at *Quebec*. The vessel was lost on her homeward voyage from *Quebec* in *December, 1831*, by the perils of the seas. The master and crew fully intended to sail for *Quebec* on the 15th of *August*, if it had been possible, and did all they could, and used every means and exertion to do so, and got the vessel out of dock, and warped her down the river as far as the depth of water enabled them, as before stated.

This case was argued in *Easter Term, 1834 (a)*, when it was ordered by the Court of *Exchequer*, that the cause should go down to a new trial, upon the question whether the master, on the 15th of *August*, by hauling out of dock, and warping down the river, intended to place himself in a more favourable situation for the prosecution of the voyage, or merely and solely to comply with the terms of the warranty. The cause was accordingly again tried before *Gurney, B.*, at the *Lancaster Summer Assizes, 1834*, when, in addition to the facts stated in the former case, the jury found that the master and crew, by hauling out of dock and warping down the river, intended to put themselves in a better situation for the prosecution of the said voyage, and not merely and solely to fulfil the warranty, but that at the time when the said vessel quitted the dock, they knew it was impossible to get to sea that day. Upon

(a) See 2 C. & M. 581.

this verdict judgment was given for the plaintiff in the Court below, and a writ of error was afterwards brought upon that judgment. The points stated for argument on the part of the plaintiff in error were, that the *Cyclops* did sail for *Quebec* after the 15th of *August*, and consequently that the warranty was not complied with; that hauling the vessel out of dock and warping her half a mile down the river on the 15th, when the captain knew it was impossible to proceed to sea, was not a sailing within the meaning of the warranty; for the defendant in error, that the going out of the dock, and proceeding down the river as stated in the special verdict, was a sailing on the 15th of *August* within the terms of the warranty.

The case was now argued by

*Cresswell* for the plaintiff in error.—The judgment in this case ought to be reversed, because the warranty in the policy not to sail for *British North America* after the 15th *August*, 1831, was not fulfilled. In *De Hahn v. Hartley* (a), Lord *Mansfield* said, “A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist, unless it be literally complied with.” In this case it is submitted that the vessel did sail after the 15th, as she was in harbour after that time. It makes no difference that the party was ready to comply with the warranty, but was prevented by stress of weather from so doing. *Hore v. Whitmore* (b). [*Denman*, C. J.—Taking it for granted that if she did not sail in due time, the warranty would not be complied with, whatever might be the cause of her not sailing, the question is, whether this was a sailing on the 15th of *August*.] In *Hore v. Whitmore*, the policy was at

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*Exch. Chamber.*, and from *Jamaica* to *London*, warranted to sail on or before the 26th of *July*, 1776. The vessel was ready to sail, and would have sailed, on the 25th, had she not been restrained by Sir *Basil Keith*, the then governor of *Jamaica*. The Court were of opinion that a nonsuit ought to be entered. Sailing at a place is not sailing from the place. The first case as to that point is that of *Bond v. Nutt* (*a*). There the policy was at and from *Jamaica* to *London*, warranted to have sailed on or before the 1st of *August*, 1776. The vessel sailed completely laden from St. *Anne's* in *Jamaica*, on the 26th of *July*, for *Bluefields* in *Jamaica*, for convoy; and it was held that the warranty was satisfied, for that the vessel sailed from St. *Anne's* for *England*, *sic Bluefields*, that being a proper course, otherwise it would have been a deviation. In that case *Bluefields* was not considered as the point of departure, but the vessel was considered to be no longer at *Jamaica* after she had left St. *Anne's*. That case, therefore, is very distinguishable from the present. In *Moir v. The Royal Exchange Assurance Company* (*b*), it was held, that the warranty to "depart" before a certain day, did not mean merely to break ground, but fairly to set forward on the voyage. Suppose this had been a warranty to depart on or before the 15th of *August*, would this have been a compliance with the warranty according to that decision? [*Littledale*, J.—The warranty in this case has nothing to do with the port of *Dublin*; the warranty is "not to sail for *British North America* after the 15th of *August*."] In *Moir v. The Royal Exchange Assurance Company*, *Gibbs*, C. J., says, "To sail, is to sail on the voyage; to depart, must be to depart from some particular place." In *Thellusson v. Fergusson* (*c*), the policy was, "At and from *Guadalupe* to *Havre*, warranted to sail on or before the 31st of *December*." The ship took in her complete lading and provisions for *France*, and all her clearances and papers, at a

(*a*) 2*Cowp.* 601.    (*b*) 6 *Taunt.* 241.    (*c*) 1 *Doug.* 361.

port called *Pointe à Pitre*, in the island of *Guadaloupe*, and sailed from thence on the 24th of *October* for *Basse-terre*, the residence of the *French* governor, for the purpose of joining convoy, who would not permit her to depart until after the 31st *December*, there being no convoy until after that time; and it was held that the warranty was complied with. There the Court considered the sailing was from *Pointe à Pitre*, and *Buller*, J., said, "There must be a lawful *bond fide* sailing, which I think there was in this case." In *Wright v. Shiffner* (*a*), the policy was, "At and from *Surinam* and all or any of the *West India* islands (except *Jamaica*) to *London*, warranted to sail on or before the 1st of *August*, 1807." The vessel did sail from *Surinam* before the 1st of *August*, having taken in her homeward cargo for *Tortola*, one of the *West India* islands, to find convoy, where she arrived on the 4th of *August*. It was held that the warranty was in substance "to sail from her last loading port on or before the 1st of *August*," &c., and that she had done so. In none of the cases is it laid down that weighing anchor will be a compliance with a warranty to sail. In *Lang v. Anderdon* (*b*), the policy was, "At and from *Demerara* to *London*, warranted to sail from *Demerara* on or before the 1st of *August*, 1823." The ship, with her cargo complete, sailed on the 1st of *August* beyond the mouth of the river; but the tide being low, she anchored under a shoal, which the ships cross without full cargo, and did not cross the shoal until the 3rd of *August*, when the pilot was discharged. It was there certainly held that the vessel sailed from *Demerara* on the 1st of *August*, within the meaning of the policy. There Lord *Tenterden* says (*c*):—"It was contended that the words 'from *Demerara*' must have the same sense in every case, and must therefore be construed to mean 'sail from the outside of this shoal.' And if that part of the sea which lies at the outside of the shoal was,

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in a popular or general sense, part of *Demerara*, this argument would prevail. But the fact appears to be otherwise." And again he says (*a*):—"If the outside of this shoal had been part of the port of the ship's departure, or in any popular and general sense a part of *Demerara*, we should have thought the warranty not complied with." It is submitted that the warranty in the present case must be taken to mean from some port of departure; otherwise the warranty might attach upon this vessel at any time before her arrival at *North America*, even half way across the *Atlantic*. The warranty to sail means to sail from the loading port. This must mean sailing from the port of *Dublin*; but the vessel was safe in *Dublin* harbour on the 15th, and would have been protected there by the policy. She did, therefore, sail after that day. The mere warping down the river within the port of *Dublin* was not a compliance with the warranty. Even if she had put up sails in the *Liffey*, it would not have been a compliance with it. Suppose the warranty had been that the vessel should sail for *British North America* after the 15th of *August*, could it be said that, in this case, the warranty had not been complied with? Could it be said that, if in such a case they had warped the vessel down the river on the 15th, so as to be ready to set sail on the 16th or 17th, it would have been a breach of the warranty not to sail till after the 15th? [*Littledale*, J.—Suppose the warranty had been that the vessel should not proceed on her voyage after the 15th of *August*, what would have been the meaning of such a warranty?] That would have meant the same as if it had been not to depart after that time; and it is contended that this vessel did not "depart" until after the time specified in this warranty. [*Littledale*, J.—You say that "for" means "from the port." Suppose that there had been a contract for the carriage of goods, and the vessel had been

lost in the river *Liffey*, on whom would the loss have fallen?] On the master. If the contract were to carry goods from *Dublin* to *Halifax*, and there was an averment in the declaration that the goods were delivered to the master to carry, that would make him liable for them if subsequently lost. [*Littledale*, J.—Would it not satisfy the meaning of the warranty here, then, that the vessel, with her full cargo, left her moorings, and proceeded down the river, for the purpose of commencing her voyage, on the 15th? *Vaughan*, B.—Your argument is, that the word “for” and the word “from” mean the same thing.] The word “for” renders it necessary that you should import the word “from” into the construction of this policy. [*Littledale*, J.—May not sailing be at the port?] In *Nelson v. Salvador* (*a*), it was held that a warranty to sail on or before a particular day, is not fulfilled, if the ship does not completely unmoor on that day, though she then has her cargo on board and is quite ready to sail, and is only prevented from so doing by stress of weather. Sailing at the place is not a sailing from the place. It is submitted that this vessel was at *Dublin* on and after the 15th of *August*.

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*Wightman, contra*, was stopped by the Court.

**Lord DENMAN**, C. J., delivered the judgment of the Court.—(After stating the case)—We have considered this question, both in the course of the very ingenious argument, and since counsel have withdrawn, and we are of opinion that this vessel must be taken, under the circumstances stated, to have been, on the 15th of *August*, in the prosecution of the voyage to *North America*; for we think that, in point of fact, she had commenced her voyage. In order to bring it within those cases in which it has been

(*a*) Mo. & Malk. 309.

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held that the voyage had not commenced, and therefore that the policy did not attach, Mr. *Cresswell* has been obliged to assume that there was a particular *terminus à quo* contemplated in this policy; but when we look at the terms of it, we do not find that to be a term of the policy; but, being a time policy in general, the warranty is that she shall not sail for *British North America* after the 15th of *August*. If, therefore, she was in fact in the prosecution of any voyage from any place, which voyage is not proved to have commenced after the 15th of *August*, the warranty is not broken; and as the facts appear to us clearly to shew that she was in the prosecution of her voyage on the 15th of *August*, having made a movement, though in the river, for the purpose of proceeding to sea, and over the sea to *North America*, we think that the warranty has not been broken, and that the parties are entitled to recover. That makes the case of no very general application, and distinguishes it from all the cases that have been before the Courts on former occasions; for there is no particular point from which the voyage is contemplated as commencing. If that had been so, we should have been bound to consider the effect of the word "sailing" as contradistinguished from the word "departure," which we do not feel ourselves called upon to do on the present occasion. Mr. *Cresswell* has very properly abandoned the argument that the word "sailing" can be confined to the mere technical act of hoisting the sails, or any thing of that sort; the fair question is, as he has stated, whether, at the time of the loss, the voyage can be said to have commenced, and whether she was in truth proceeding on her voyage to *North America*. Now, considering that there was no distinct point of commencement pointed out by this policy, we think that the vessel was in the prosecution of her voyage, and, consequently, within the protection of the policy.

Judgment affirmed.

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PREEDY v. M'FARLANE.

IN this case, *Price* had obtained a rule to shew cause, why the defendant should not be allowed his costs, under the 43 Geo. 3, c. 46, s. 3. It appeared that the affidavit of debt was for 27*l.* for attendance by the plaintiff as a surgeon, and also for board and lodging. The writ on which the defendant was arrested and taken to prison was, by mistake, indorsed for bail for 37*l.* At the trial the jury found a verdict for the plaintiff for 28*l.*; but as there was no count in the declaration applicable to that part of the demand which was for board and lodging, the learned judge directed the jury to deduct the amount of the sum due for board and lodging from the verdict, and they ultimately found a verdict for 20*l.* only. It was stated in the affidavits in answer to the rule, that the plaintiff had told the sheriff's officer, that it was by mistake that the writ had been indorsed for 37*l.*, instead of 27*l.*; and that the plaintiff had informed the officer, that he was not to arrest for more than 27*l.*; and that the officer had afterwards told the defendant, he was to give bail for 27*l.* only; but there was no affidavit from the officer himself.

*Jervis* shewed cause.—The defendant was only arrested for 27*l.*, and the jury found a verdict for more than that sum; and it was owing to an omission in the declaration only, that the verdict was ultimately taken for a less amount. There is no pretence, therefore, for saying, that there was a want of reasonable or probable cause for arresting the defendant for that amount.

*Price, contrà*, objected, that there was no affidavit from the officer that he had told the defendant he was to give bail for 27*l.* only, and he stated that the præcipe was for 37*l.* [*Jervis* objected, that the rule was drawn up on reading

Where, owing to the omission of a count in the declaration, applicable to part of the plaintiff's demand, the plaintiff was prevented from recovering an amount equal to the sum for which the defendant was arrested, and which the jury had found to be due; but, on the omission in the declaration being discovered, the verdict was ultimately given for a less sum:—*Held*, that the defendant was not entitled to costs under 43 Geo. 3, c. 46, s. 3.

*Held*, also, that he was not so entitled, although the indorsement for bail on the *capias* by mistake stated a larger sum than that stated in the affidavit of debt, the defendant not having been arrested for the amount so indorsed, but for the amount really due.

Where a defendant is arrested and goes to prison, it is "an arrest and holding to bail" within the meaning of the statute.

*Book of Pleas,* the affidavit of debt and the capias only; and that the preceipe was not verified by affidavit, and consequently could not be referred to.] It is on the files of the Court, and may therefore be referred to. [Parke, B.—It cannot be referred to, unless it is verified by affidavit.] Then the words of the act are, “in all actions in which the defendant or defendants shall be arrested, and held to special bail.” Where a party is arrested and sent to prison, he is held to bail within the meaning of the statute. It is submitted, that it must be shewn to the satisfaction of the Court, that the defendant was not arrested for more than was actually due, and the sum recovered by the verdict of the jury shews what is the amount due.

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged. I think that where a defendant is arrested and goes to prison, it is “an arrest and holding to bail” within the statute; and that it is equally the same as if the party were held to bail. It is now settled, that the Court will look to all the circumstances of the case, to see whether the party has been improperly arrested, and whether there was reasonable or probable cause for the arrest. Here the defendant was not arrested for more than 27*l.*, and although the verdict ultimately was for a less sum, that was owing to an omission in the declaration; and it appears, that the jury thought that the plaintiff was entitled to recover to the amount of 28*l.* We therefore think, that the defendant was not arrested without reasonable or probable cause.

The rest of the Court concurred.

Rule discharged (a).

(a) *Vide Bates v. Pilling, 2 C. & M. 374.*

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BYRN v. DIBBIN.

**I**N this case, *Bompas*, Serjt., had obtained a rule to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled, on the ground that the defendant was privileged from arrest, he being a chaplain to his Majesty at an annual salary, and liable to be called on to do duty at *St. James's* chapel at any time. He produced an affidavit verifying the appointment, and stating the above facts. The affidavits in answer stated that the defendant had a living near *Newmarket*, and had only once performed the duty of chaplain, which was more than two years ago.

A King's chaplain is privileged from arrest, and if he has been arrested, and has given a bail-bond, the Court will, on motion, order the bail-bond to be cancelled.

*Busby* shewed cause.—It is submitted, that a King's chaplain is not, as such, privileged at all times, but only during the time he is in attendance on his Majesty. In *King v. Foster* (*a*), it was certainly held that the defendant was entitled to privilege, as having the appointment of coachman to his Majesty, although he carried on a trade in the *Strand*; but it was there said, that beyond doubt the defendant's employment was not colourable, but his real occupation; and in *Luntley v. Battine* (*b*) it was held, that when the question of privilege from arrest was doubtful, the Court would not discharge the defendant on motion, but leave him to his writ of privilege. So, in the recent case in this Court, *Leslie v. Disney* (*c*), that principle was acted upon. That was the case of the *Somerset* herald, and this Court refused to discharge him out of custody, but left him to sue out his writ of privilege. [Parke, B.—A chaplain is one of the King's servants in ordinary.] It is sworn here that this defendant has only performed duty once. And in *Luntley v. Battine*, Lord Chief Justice

(*a*) 2 Taunt. 167.

(*b*) 2 B. & Ald. 234.

(*c*) Ante, 578.

*Exch. of Pleas.*, *Abbott* says:—"As there is no great necessity for the service of these officers, the occasions being but rare when they are called upon, and when they occur, not requiring the attendance of them all, I do not think that any inconvenience will result to his Majesty's service by our leaving the defendant to sue out his writ of privilege, in order that the point may be solemnly determined upon record." It lies on the defendant to make out his privilege, and if the Court entertain any doubt, they will leave the defendant to his writ of privilege. If the defendant is not in actual attendance, then he is bound to be at his living; and is it to be said that he is privileged from arrest whilst he is attending to his private duties as a clergyman in the neighbourhood of *Newmarket*? The defendant cannot be entitled to so large an exemption.

*Bompas, Serjt., contrà, was stopped by the Court.*

**Lord ABINGER, C. B.**—All that the defendant is called upon to shew is, that he is the King's servant, and liable to be called on as such to perform services. A chaplain is liable to be called on at all times, and if he could be arrested, the King could not have his services.

**PARKE, B.**—In *Leslie v. Disney*, the defendant was not a servant in ordinary with fee, but a chaplain is.

**Rule absolute.**

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Doe d. EUSTACE v. EASLEY.

**EJECTMENT** to recover possession of certain copyhold lands and tenements, holden of the manor of *Ealing*, in the county of *Middlesex*. By the agreement of the parties, and by the order of a learned Baron, the following facts were stated for the opinion of this Court, pursuant to 3 & 4 Will. 4, c. 42, s. 25:—

*Edward Eustace*, late of *Great Ealing*, in the manor and county aforesaid, being seised of the premises in question, in fee, duly surrendered the same to the use of his will; and by his will in writing, bearing date the 1st of March, 1807, duly executed and attested, and since proved in the Prerogative Court of Canterbury, devised the same as follows:—"I devise and bequeath my copyhold dwelling-house, together with the outhouses, gardens, and furniture, situate in *Great Ealing*, aforesaid, (being the premises in question), for the use and benefit of my beloved wife, *Mary Eustace*, during her natural life; and, after her death, I devise and bequeath the same for the use and benefit of my nephew, *John Eustace*, and his wife, *Sarah Eustace*, during their natural lives. I devise and bequeath the said copyhold house, together with the outhouses, gardens, and furniture, after the death of the above-named *Mary Eustace*, and *John* and *Sarah Eustace*, for the use and benefit of *Sarah Eustace*, daughter of the said *John* and *Sarah Eustace*, during her natural life; and, after the death of the above-named *Mary Eustace*, *John* and *Sarah Eustace*, and *Sarah Eustace*, their daughter, to revert to my next male heirs for ever." The said *Edward Eustace*, in the month of May, 1808, died, seised of the premises in question, without issue, and without having revoked or altered his said will.

The said *Edward Eustace*, the testator, had two

*A.* devised certain copyhold lands to his widow, *M. E.*, for life, remainder to his nephew, *J. E.*, and his wife, *S. E.*, for their lives, remainder to *S. E.*, (the daughter of *J. E.* and *S. E.*), for life, and after the death of *M. E.*, *J. E.*, and *S. E.*, and of *S. E.*, the daughter, "to revert to my next male heirs for ever":—  
*Held*, that these words meant "heirs male of the body," and that as the testator died without issue, the reversion, on the determination of the life estates, descended to the customary heir.

*Exch. of Pleas,* brothers, the elder of whom died, without issue, in the testator's lifetime; the other, named *Robert*, survived the testator, and died intestate in 1813, leaving issue five sons him surviving, in order of birth as follows: *Robert*, who died without issue; *John*, who with his wife *Sarah* and their daughter *Sarah*, were tenants for life, named in the testator's will; *Joseph*, who died without issue; *Edward*, now living; and *Richard*, the lessor of the plaintiff. *Mary Eustace*, the first tenant for life, survived her husband, the testator, and on the 28th of November, 1808, was duly admitted to hold the premises in question during her natural life; remainder as specified in the will. *Mary Eustace* died November, 1814. *John Eustace* and *Sarah* his wife, the second and third tenants for life, were duly admitted on March 27, 1815, to hold the same for their natural lives; remainders over as above. *John Eustace* died July, 1823; *Sarah* died in June, 1833: whereupon *Sarah*, daughter of the said *John* and *Sarah Eustace*, the last tenant for life named in the will, and who had married a person named *Easley*, entered, and died August the 13th, 1833, leaving issue a son, *Abraham Easley*, the defendant in this suit.

The custom of the manor of *Ealing* is, that the copyhold lands and tenements descend to the youngest son; and if no son, to the youngest brother; and if no brother, to the youngest nephew of the tenant last lawfully seized of the fee, whether in possession, reversion, or remainder.

The question for the opinion of the Court was, whether, under the circumstances above stated, the lessor of the plaintiff was entitled to the copyhold lands and tenements in question; and if the Court should be of opinion that the lessor of the plaintiff was so entitled, then a judgment was to be entered for the plaintiff by *relictæ verificatione* and confession; but if the Court should be of a contrary opinion, then a *nolle prosequi* to be entered for the plaintiff, immediately after the decision of the case, or otherwise as the Court

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should think fit; it being agreed, in pursuance of the said statute, that all the proceedings herein should be pursuant to the directions and decision of the said Court.

*M. Dawson*, for the lessor of the plaintiff, was stopped by the Court.

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*Hodgson*, for the defendant.—The ultimate devise is not to the devisor's next heir, but to his next male heir. The defendant being the testator's general heir male, is therefore entitled to the estate, and not the lessor of the plaintiff, who is the customary heir. Some meaning must be given to the word *male*, for if the words "next male heir" were to be held to amount to no more than "next heir," the clause would be wholly inoperative, and the devise might have stopped at the word *revert*; and the effect of such a construction would be to strike that devise out of the will. If this is construed as a contingent remainder, the party who is to take must be *very heir* as well as *heir male*. [ *Parke*, B.—The lessor of the plaintiff is so, if the devise is interpreted with reference to the subject-matter.] If this is to be considered as a remainder, and the party is to take by purchase, it is the common law heir, and not the customary heir, who must take (*a*). The real meaning of the devise is, that the estate should go to the devisor's next *general heir*, provided he was a *male*. [ *Lord Abinger*, C. B.—The will must not be construed by the event. Suppose, when the reversion fell in, the next heir had been a female?] In that case, the remainder would have failed, because there would have been no person to answer the description in the devise. The old rule, as stated by *Lord Coke* (*b*), is, that no person can take by purchase as *heir male*, unless he be the general heir as well as *heir male*. Undoubtedly, in the

(*a*) See Rob. on Gav. book 1, c. 6, p. 117.      (*b*) Co. Litt. 24. b.

*Exch. of Pleas,* case of *Brown v. Barkham* (*a*), that rule was not adhered to by Lord *Cowper*; but Lord *Hardwicke* (*b*), though he confirmed his decision, and expressed his disapprobation of the rule laid down in *Co. Litt.*, guarded himself in his judgment by deciding upon the evidence of the devisor's intention, which, he stated, introduced an exception to the general rule; and Lord *Cowper's* doubt has never been applied to any devise, except an express gift to the heirs male of the body (*c*). In *Wills v. Palmer* (*d*), the Court of *King's Bench* also certified contrary to the construction now contended for. The rule laid down in *Co. Litt.* is a part of the general legal principle that the heir at law is not to be excluded but by express provision; therefore it is necessary that the person claiming against him should fully answer the description pointed out in the will. And if the Court look to the intention of the devisor in this case, it will be apparent that he never intended that the heirs of the body should succeed; for it must be observed that the testator gives an estate for life to his wife, another to a nephew and niece, and a third to a daughter of that nephew and niece, who were not the heirs of his body, nor the customary heirs; and it cannot be presumed that he intended to exclude the son of that daughter to whom he had given a life estate. In *Cholmondeley v. Clinton* (*e*), Mr. J. *Bayley* expressed his opinion that the intention of the settlor of the estate might be considered in forming a judgment upon the meaning of the terms of the settlement.

(*a*) Prec. Ch. 442—461.

(*b*) See *Newcoman v. Bethlem Hospital*, Ambl. 8.

(*c*) In *Goodtitle e. d. Weston v. Burtenshaw*, Append. to Fea. Cont. Rem. No. 1, a daughter (though not very heir, because her brother's child was living) took as

purchaser under a limitation in a deed to the heirs female of the body of her father. See also Co. Litt. book 1, Notes 53 and 145.

(*d*) 5 Burr. 1615.

(*e*) 2 Jacob & Walker, 1; S. C. 2 B. & Ald. 625.

**LORD ABINGER, C. B.**—The construction hitherto put upon these words has been “heirs of the body;” and I think it would be a dangerous thing to put a different construction upon them to that which has prevailed for the last fifty years. It is better to look to the strict legal meaning of the terms than to some supposed intention of the devisor, which is not expressed in the will. It does not appear that the devisor intended the words to be used in any different sense.

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**PARKE, B.**—As the testator left no heirs of his body, the estate must descend. The term heirs male is now generally held to be heirs of the body. The only argument in favour of construing these words in a different sense from their ordinary import arises from the improbability that the testator should prefer his nephews to his own after-born children; but that is not a sufficient ground for us to depart from the general rules of construction.

#### Judgment for the lessors of the plaintiff.



#### ATKINSON v. WARNE.

**TRESPASS and false imprisonment.**—The declaration contained one count only, which stated that the defendant, on &c., with force and arms, made an assault upon and beat the plaintiff, and caused him to be apprehended on a false and malicious charge of felony, and forced him to go from a certain dwelling-house, situate &c., into a public

To a declaration containing one count only in trespass for assault and false imprisonment, the plea justified the apprehending the plaintiff on a charge of felony,

and proceeded to aver that the plaintiff resisted, whereupon he beat him, &c. At the trial, the justification as to the apprehension for felony was proved; but the defendant did not prove the resistance of the plaintiff. The jury having found for the defendant:—*Held*, that the verdict was right: the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged.

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street, and in and along divers public streets, to a certain station-house, and there imprisoned the plaintiff upon the said charge for the space of three days then next following, and afterwards then compelled him to go into a public street, and in and along divers public streets, to a public office, situate &c., and then and there imprisoned the plaintiff upon the said charge, without any reasonable or probable cause, for a long time, to wit, forty-eight hours then next following, and against the will of the plaintiff, by means whereof, &c.

To this declaration the defendant pleaded as follows:— The defendant in his own person says, that before the commission of the said supposed trespasses in the said declaration mentioned, to wit, on &c., the said plaintiff did then feloniously take, steal, and carry away, divers, to wit, twenty pounds of feathers, part of a certain bed let to be used by him in and with divers rooms and premises, part of the dwelling-house in the said declaration mentioned, under a certain contract entered into by him; whereby the said plaintiff was guilty of felony, contrary to the form of the statute in such case made and provided, and against the peace of our lord the King; wherefore the defendant did, at the time when, &c. in the said declaration mentioned, assault and beat the said plaintiff, and gave the said plaintiff in charge to one *T. B.*, then being one of the metropolitan peace officers according to the statute, and a peace officer of our said lord the King, authorized in that behalf, and then and there requested the said *T. B.*, so being such peace officer as aforesaid, to take the said plaintiff into his custody, and safely keep him, and carry and convey him the said plaintiff into the said street, and in and along the said public street to a certain station-house, as in the said declaration mentioned, and to imprison the said plaintiff on the said charge, and to carry and convey him afterwards before some one of the justices assigned to keep the peace

of our said lord the King within the said county, and to hear and determine divers felonies and misdemeanours committed within the said county, to be examined by and before such justice touching and concerning the premises, and to be further dealt with according to law; and on that occasion the said *T. B.*, so being such peace officer as aforesaid, at the request of the said defendant, did assault the said plaintiff, and did take the said plaintiff into his custody; and because the said plaintiff did resist and beat the said *T. B.*, and would not, being then and there requested, peaceably and quietly proceed with the said *T. B.* to the said station-house, he the said *T. B.* did then and there necessarily a little strike and beat the said plaintiff, and did oblige the said plaintiff to go, and did carry and convey the said plaintiff from the said dwelling-house into the said public street, and in and along divers other public streets to the said station-house in the said declaration mentioned, and did then and there imprison the said plaintiff on the said charge for the said space of time in the said declaration mentioned, being then and there a reasonable time in that behalf; and as soon as he conveniently could he compelled the said plaintiff to go into a street, and in and along divers public streets to a public office situate &c., and then and there imprisoned the said plaintiff; and the said plaintiff was accordingly carried and conveyed in custody to the said public office, before *J. R.*, Esq., one of the justices assigned to keep the peace of our said lord the King within and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the said county, to be examined by and before the said *J. R.*, Esq., so being such justice as aforesaid, touching and concerning the said premises, and to be further dealt with according to law. And so by means of the premises the said defendant made an assault upon and beat the said plaintiff, and caused him to be ap-

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prehended on the said charge of felony, and forced him to go from the said dwelling-house into a public street, and in and along divers public streets to the said station-house, and imprisoned the said plaintiff upon the said charge, and compelled him to go into the said public street in that behalf mentioned, and in and along divers public streets to the said public office, and imprisoned the said plaintiff upon the said charge for the said space of time in the said declaration mentioned, the same being a reasonable time for that purpose; and which are the said supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above complained against the said defendant; and this the said defendant is ready to verify, &c.

To this there was the general replication *de injuria*.

At the trial, the defendant having proved a justification of one assault, the jury found a verdict for the defendant.

*F. V. Lee* now moved to set aside the verdict, and to enter a verdict for the plaintiff.—There being no evidence given to prove that part of the plea which states that the plaintiff “ resisted the police officer and refused quietly to proceed to the station-house in his custody, wherefore the defendant committed the assault mentioned in the declaration,” the plaintiff was entitled to recover. The defendant was bound to have proved the whole of the matter stated in the plea as a defence to the action; and not having done so, he failed in making out an answer to the plaintiff’s case.

**Lord ABINGER, C. B.**—There was only one assault charged in the declaration, and one plea justifying that assault. If the plaintiff proved that one assault had been committed, and the defendant proved so much of his plea as was a sufficient answer to that assault, it was unnecessary for the defendant to prove the rest of his plea. The plaintiff could not have proved more than one assault, and

the defendant could not therefore be called upon to prove *Exch. of Pleas,*  
more than was a sufficient answer to one assault. *1835.*

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BOLLAND, B., and GURNEY, B., concurred.

Rule refused (*a*).

(*a*) Vide *Timothy v. Simpson*, ante, p. 757.

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**ARNELL *v.* WEATHERBY.**

**I**N this case, *Mansel* had obtained a rule to shew cause why the *ca. sa.* issued against the defendant should not be set aside, and why the defendant should not be discharged out of custody, on the ground that it was stated in the *ca. sa.* that the sum recovered by the plaintiff was 100*l.*, whereas the judgment was in fact for the sum of 88*l.* only, that being the amount of damages and costs.

Where, in the body of a *ca. sa.*, the sum recovered was stated to be 100*l.*, but the writ was properly indorsed for 88*l.* only, the amount of the damages and costs, and the defendant was only taken in execution for that sum, the Court, on motion, allowed the *ca. sa.* to be amended, on payment of costs, and discharged a prior rule which had been obtained to set it aside, without costs.

Pending that rule, a cross rule was obtained by *Fish*, on behalf of the plaintiff, calling upon the defendant to shew cause why the *ca. sa.* should not be amended. This motion was made upon an affidavit, stating, that, although the sum of 100*l.* had been inserted by mistake in the body of the *ca. sa.*, the writ had been indorsed for the sum of 88*l.* only, and the defendant had been taken in execution for that sum only.

Both rules, by the direction of the Court, came on together.

*Fish* now shewed cause against the first rule, for setting aside the *ca. sa.*.—He objected, *first*, that it did not appear on the face of the affidavit on which that rule had been obtained, that the application had been made by the defendant's sanction; that the affidavit was expressed to

*Exch. of Pleas,* be made by "R. F. Thompson, of H., gentleman," not  
stating him to be "attorney for the defendant." He  
further objected, that the application was made too late.  
  
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v.  
WEATHERSY. The defendant was taken in execution on the 6th of  
January, the first day of term being the 12th, and the  
application was not made until the 22nd; and, therefore,  
the defendant has been guilty of delay, and the  
rule ought to be discharged. He also urged that no  
prejudice had been done to the defendant by the mistake  
in the body of the *ca. sa.*, inasmuch as the officer, in ex-  
ecuting the writ, had been governed by the indorsement,  
which was correct. He submitted further, that the rule  
for amending the *ca. sa.* ought to be made absolute, with-  
out payment of costs; and cited *Laroche v. Was-  
brough* (a), *Newnham v. Law* (b), and *Shaw v. Maxwell* (c),  
to shew that a plaintiff had been allowed to amend a *ca. sa.*  
after execution, without payment of costs.

*Mansel, contra,* was heard in support of his rule, and  
against the amendment.

*The Court* ordered that the rule for setting aside the *ca.  
sa.* should be discharged, without costs; and made the rule  
for amending the *ca. sa.* absolute, upon payment of costs.

Rule accordingly.

(a) 2 T. R. 737.      (b) 5 T. R. 577.      (c) 6 T. R. 450.

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## COLSTON v. BERENDS.

**I**N this case, in the body of the writ of *capias*, the word *Middlesex* was by mistake written "Middesex." An application had been made to *Bolland*, B., at chambers, on the part of the defendant, to be discharged out of custody on that ground, on the authority of the case of *Hodgkinson v. Hodgkinson* (*a*), where the Court of *King's Bench* held that the defendant in such a case was entitled to his discharge. The learned Baron made an order for the discharge of the defendant at the expiration of two days, unless the Court should order differently, and recommended an application to be made to the full Court. *Hoggins*, in *Michaelmas Term* last, moved for a rule to shew cause why the writ of *capias* should not be amended.

**PARKE, B.**—According to the practice it cannot be amended, but the case of *Hodgkinson v. Hodgkinson* has been doubted. The proper course will be, to grant you a rule to shew cause why the order of my Brother *Bolland* should not be set aside.

On the last day of *Michaelmas Term*, *Hoggins* moved to make that rule absolute. No cause being shewn against it, and the Court having asked what the ground of the motion was, ordered the rule to be made absolute.

The case of *Hodgkinson v. Hodgkinson* having been again cited, in *Hilary Term*,—

**ALDERSON, B.**, said, it had been overruled in this Court, alluding to the present case. And, in *Easter Term* following, the principal case having again come before this

Where, in the body of a writ of *capias*, the word *Middlesex* was by mistake written "Middesex?"—*Held*, that it was not a valid objection, and was no ground for ordering the defendant to be discharged out of custody on entering a common appearance.

(a) 2 Dowl. P. C. 535.

*Exch. of Pleas.*, Court, and the case of *Hodgkinson v. Hodgkinson* having  
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been alluded to—

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PARKE, B., said—You must not take that as an authority, as this Court has overruled that decision.

BUCKWORTH *v.* SIMPSON and BENNER.

An action of *assumpsit* for the breach of an implied contract to keep premises in repair is transitory and not local.

Where an instrument, which was in reality a lease, but which bore an agreement stamp for 15*s.*, was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l.* 10*s.*, but was stamped in 1834 under the provisions of the 37 Geo. 3, c. 136, s. 2, with a stamp of 1*l.*, being the amount of the stamp then in force:—*Held*, that the proper duty had been paid.

*A.* demised to *B.* certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent:—*Held*, that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract.

consideration that he had undertaken to let the premises to *William Barber* on the same terms as in the agreement made with his guardians, the said *William Barber* undertook to perform the same in all things on his behalf to be performed; that, on the 5th of *January*, 1821, the said *William Barber* made his will, and authorized and directed the defendants, together with one *C. M. Edmunds*, to continue his business in trust for certain persons and purposes, and died on the 2nd of *March*, 1821: that the two defendants proved the will, and that all the estate, right, title, and interest of the said *William Barber*, of, in, and to the said demised premises came by assignment to the defendants. It then further alleged, that, in consideration of the premises, and that the plaintiff would permit them to continue in possession of the demised premises as such assignees, and would omit to give them six months notice to quit at the proper time and according to the terms in the agreement mentioned, the defendants undertook to perform the agreement in all things to be performed on the behalf of the said *William Barber*. The declaration then averred that the said *William Barber* was tenant to the plaintiff until his death, and that after his death the defendants became and were the tenants, and continued as such tenants in possession to the plaintiff for a long space of time, to wit, until the 6th of *April*, 1833; and although the plaintiff suffered them to remain in possession, and omitted to give them six months' notice to quit at the proper time and according to the terms of the agreement, yet that the defendants, as such assignees as aforesaid, during the tenancy since the death of the said *William Barber* until the 6th *April*, 1833, did not keep the premises in repair, but delivered them up on that day in a bad and untenantable state of repair.

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The *second* count was similar to the first.

The *third* count omitted the statement of the letting by the trustees, but stated that *Barber* took the premises.

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" SIMPSON.

from the plaintiff, and promised to keep them in complete repair, and then alleged the defendants' liability and breach of contract, as in the first count.

The *fourth* count was similar to the third, with the exception that *Barber's* engagement was expressed somewhat more generally; and it was alleged that on *Barber's* death the premises came to the defendants by assignment, and they engaged to use them in a tenant-like and proper manner during their tenancy. The *last* count was for use and occupation.

The *venue* was laid in *Middlesex*.

The defendant *Benner* suffered judgment by default, but the defendant *Simpson* pleaded the general issue and the Statute of Limitations, upon which the plaintiff joined issue.

The cause was tried before *Gurney*, B., at the *Middlesex* sittings after last *Michaelmas* Term, when it appeared that *Barber* took the premises, which were situate in the county of *Lincoln*, under this agreement with the trustees, and had occupied them until his death; and the jury found on the evidence that the defendants *Simpson* and *Benner* had become the tenants of the plaintiff after the death of *Barber*; they also found that the dilapidations, according to the liability stated in the declaration, amounted to 3*4l.*; but that, according to the liability of a tenant from year to year, they would amount to 5*l.* only. The original agreement with the trustees, dated 6th *December*, 1805, was produced, bearing upon it an agreement stamp of 15*s.*, and also a 1*l.* stamp, which latter stamp had been recently affixed to the agreement. It was objected that the stamp, according to the act in force at the time of the execution of the instrument, ought to have been 1*l. 10s.* It was also objected, that this action was not brought in the proper county; that the cause of action was local, and the venue ought to have been laid in the county where the premises were situate. It was also objected that there was

no evidence to shew any express agreement by the executors to hold the premises as alleged in the declaration. It was further objected that the legal estate was not in the plaintiff, but in his trustees. The learned Judge overruled the objections, but gave the defendant leave to move to enter a nonsuit or a verdict for the defendant, or to reduce the damages for the dilapidations from 34*l.* to 5*l.*

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*M. D. Hill*, early in this term, moved accordingly on all the points reserved. The Court granted a rule on the objections to the stamp, and as to the proof of the contract alleged in the declaration. On the objection urged that the venue was local, it was answered by the Court, that this being an action of *assumpsit* on a contract, it was a transitory action, and not local; and therefore the venue was properly laid in *Middlesex*; and *Parke*, B., observed, “That the doctrine applicable to covenants running with the land was inapplicable to the action of *assumpsit*.” The Court also held, that on the evidence there was nothing to shew that the legal estate was not in the plaintiff.

*Adams*, Serjt., and *J. J. Williams*, now shewed cause.—The first question is, whether the instrument in question was properly stamped? The instrument produced had on it a stamp of 15*s.* as for an agreement; but it had also upon it a lease stamp of 1*l.*, which was affixed to it just before the trial, and which is the proper stamp for a lease imposed by the 55 Geo. 3, c. 184. It will be said that this instrument was executed in the year 1805; and that, according to the provisions of the 44 Geo. 3, c. 99, the Stamp Act then in force, the stamp upon a lease was 1*l.* 10*s.*, and, therefore, that the stamp of 1*l.* is insufficient: and that where a stamp is required to be put upon any instrument, it must be that stamp which is in force at the time of its execution. But

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the practice at the Stamp Office always is to impose the stamps in force at the time when they are affixed. And by the 55 Geo. 3, c. 184, it is expressly provided that all previous duties shall cease and determine; therefore it cannot be intended that a duty shall be imposed which the legislature has declared shall altogether cease. This instrument was stamped under the provisions contained in the 37 Geo. 3, c. 186, s. 2, which enacts, "That where any skin or piece of vellum, or parchment, or sheet or piece of paper, on which any matter or thing (except bills of exchange, &c.) shall have been engrossed, printed, or written, shall be brought to the said commissioners to be stamped, after the same shall have been executed, the same not having been stamped with any stamp, or having been stamped with a stamp of less value than is by law required, and the person or persons producing the same is desirous of having the same duly stamped, but the same cannot according to the laws in force be stamped without payment of accumulated penalties, exceeding ten pounds besides the duty, that then and in every such case it shall and may be lawful for the said commissioners to direct the proper officers, and such officers are hereby required, to stamp the same *on payment of the duty by law payable* for such vellum, &c., in respect of the instrument, matter, or thing engrossed, printed, or written thereon, and one penalty of ten pounds only for every such skin or piece of vellum or parchment, or sheet or piece of paper, although the duty payable for the same shall have been imposed by more than one act of Parliament, and notwithstanding the penalties thereupon may have accumulated to a larger sum than the said sum of ten pounds." The proper construction to be given to the words "*on payment of the duty by law payable*," is the duty which is payable by law at the time when the stamp is affixed to the instrument, whether such duty be greater or less than at the time when

the instrument was executed. In *Doe d. Dyke v. Whittemore* (a), the objection was taken at the trial that a deed could not be received in evidence, unless stamped with the particular deed stamp which by law was required at the time of the execution of the deed; *Lawrence*, J., having overruled the objection, it was abandoned as untenable on a motion before the Court *in banco* to set aside the verdict. That is an authority in favour of this construction.

With respect to the second objection, that the contract as alleged in the declaration was not proved, it is submitted that the proof given was clearly sufficient. After the death of *Barber*, the original lessee, the defendants, his executors, entered into and continued in the occupation and enjoyment of the premises, and by so doing became tenants from year to year to the plaintiff upon the terms of the original tenancy; and the plaintiff not having given any notice to determine the tenancy, by refraining to do so, entered into an implied contract with the defendants, that they should become tenants on the terms of the original lease.

*M. D. Hill and Busby, contr.*—If the construction of the stamp laws for which the plaintiff contends should be adopted, the payment of the duty properly payable on this instrument would be evaded. The stamp on an instrument like this in the year 1805, at the time it was executed, was 1*l.* 10*s.*, whereas, by the 55 Geo. 3, c. 184, it is now only 1*l.*; and if that were allowed to be sufficient, a lower stamp would be put upon this instrument than was by law contemplated and imposed at the time; which would be a fraud on the revenue. The 37 Geo. 3, c. 136, s. 1., provides for two cases: one, where, before the ap-

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*n.*  
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plication to the commissioners of stamps, no stamp whatever has been imposed; another, where a stamp too small in amount, but of the proper denomination, has been put upon an instrument. The present case is not comprehended within either the one case or the other: for, first, there was a stamp of 15*s.* upon this instrument, before the stamp of 1*l.* was put upon it, therefore it is not within the first branch; and, secondly, the stamp first imposed being an agreement stamp only, was not of the proper denomination, and, consequently, does not come within the second case. The first section of that statute provides, that when upon any instrument there shall be impressed a stamp of a particular denomination, but of an equal or greater value with the stamp required at the time of making, signing, or executing the instrument, it shall be lawful for the commissioners in every such case, upon payment of *the duty by law payable* in respect of such instrument, and a penalty of 5*l.*, to cause the same to be stamped *with the proper stamp provided and in use for the same at the time such vellum or paper shall be produced to be stamped.* That section, it might be contended, rendered it sufficient to have any instrument stamped with the stamp in use at the time; but that only applies to cases where the instrument has been stamped with a stamp of equal or greater value than the stamp required at the time the instrument was executed: and, besides, there is no such provision in the second section, and, consequently, it cannot be assumed that the legislature intended it to apply to cases coming within that section. [Parke, B.—The words in both sections are, “*the duty by law payable.*” All the duties imposed by former acts are now repealed by the 55 Geo. 3, c. 184: the duties granted by former acts cannot consequently be “*duties by law payable.*”]

Then, secondly, the allegation in the declaration, that

the defendants became and were tenants to the plaintiff, was not supported by the proof. Although the defendants, being the executors of the original lessee, and having entered into the occupation of the premises on his death, might have been liable as assignees of the term, yet they are not charged as such in the declaration; but the allegation is, that, after the death of the lessee, the defendants became and were tenants in possession to the plaintiff, which is an averment of a personal contract having been entered into between them and the plaintiff, of which there was no proof. Where a tenancy from year to year, so long as the parties respectively please, is created, with a power to either party to determine the tenancy on giving notice to quit, and the tenant occupies for several years, it is not to be considered as a new demise from the expiration of each year, but as a continuance of the original taking. And accordingly, in *Birch v. Wright* (a), *Buller*, J., says, "If a tenant from year to year hold for four or five years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years." And in *Rex v. Herstmonceaux* (b), the above passage is cited by Mr. Justice *Bayley* in delivering the judgment of the Court; and he adds, "This is on the principle that it is to be considered as a lease for so many years as the party shall occupy, unless in the meantime it shall be defeated by notice on the one side or the other." The defendants can only be personally responsible on the ground that the old lease has been determined, and a new contract has been entered into with them in express terms; but here there is no proof of any such contract. The defendants, by entering into the occupation of the premises on the death of their testator, and continuing in such possession and occupa-

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tion, may be personally liable for use and occupation; but, as respects the particular stipulations and agreements contained in the original lease, the plaintiff can only be entitled to charge them in their representative character for any breach of those stipulations. The contract, as stated in the declaration, setting out a personal agreement by them to hold on the terms of the original lease, is not supported by proof.

Lord ABINGER, C. B.—I am of opinion that this rule ought to be discharged. The objection taken to the stamp on this instrument ought not to be sustained. The different sections of the Stamp Act must have the same construction put upon them; and the ingenious observation which has been made, that, by such a construction, the party would be enabled to gain an advantage in the present case, is answered by the observation, that, in every other instance, no such advantage could be obtained, inasmuch as the duties have been increased. The statute authorizes the demand of the duties in force at the time when the stamp is affixed. The next objection is involved in some obscurity. I do not wish to raise any doubt on the decisions which have been cited to shew that, where there is a lease from year to year, which continues for several years, it may be treated as a lease originally granted for the whole term. I give no opinion in contradiction of those *dicta*. In whatever way this case is put, the action of *assumpsit* is the proper form of action to recover damages for not repairing; though, it is true, debt might also have been maintainable to recover the rent. An action of *assumpsit* has been brought against the defendants in their personal characters; and, as it is admitted that they occupied the farm after Barber's death, they are liable in respect of such occupation *de bonis propriis*. The action is, therefore, maintainable against them, and

must be in form *assumpsit*. But it is said, that the tenancy is improperly stated, as on a lease from year to year, that it ought to have been for the whole term. The rule is, that a party may, in his pleadings, set forth his whole case, and the Court may determine the legal effect of it. That has been done here. Enough is stated to raise the promise on the part of the defendants, and the declaration appears to me to be good. Indeed, I do not see how a declaration in any other form could have been supported by the present evidence. It states a demise, which is to continue from year to year, unless the parties give notice to determine it; and then there is an allegation of the two facts, namely, the absence of the notice, and the continuance of the occupation, from which the promise which is alleged in the declaration may be inferred. It appears to me, therefore, that all that is necessary to be stated to raise that promise is set forth in the declaration, and therefore that this rule ought to be discharged.

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**PARKE, B.**—I am of the same opinion, and can add nothing to what has been urged by my Lord *Abinger* on the subject of the stamp; but the other point is one of some importance. The declaration states the facts of the case correctly [the learned Baron here read the declaration]; and the promise alleged to have been made by the defendants was, that, in consideration of the plaintiff permitting them to continue in possession of the premises, and omitting to give notice according to the terms of the agreement, they would perform the agreement in all things to be performed on the behalf of *Barber*. The question is, whether this promise can be implied by law. I am of opinion that it is an implication of law, arising from the situation of the parties; and, if it were not so, great inconvenience would be felt, for this species of holding is very common. The nature of the demise is this, that the

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party taking it is to hold on from year to year, so long as the parties shall please, with the power of notifying that dissent by giving a notice to quit. Suppose the land to descend to the heir-at-law, and he omits to signify his dissent to its continuance by giving notice to quit, the tenancy will continue. Again, if the tenant assigns, and the landlord do not give notice, the assignee must hold on the same terms. That contract the law will imply; otherwise the consequence would be, that no action could be brought on the original demise when there is an occupation from year to year, and the tenant assigns, for there is no contract whatever unless the original contract is transferred by operation of law. It is contended, however, that the executors of the original landlord, where he is dead, must bring an action against the personal representative of the original tenant. That would be very inconvenient; and therefore it is better to hold that a new relation of landlord and tenant arises by implication from the situation of the parties, where there is a continuance of the occupation, and an omission by those who represent the original parties to give notice to quit.

BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

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**DIXON v. CHAMBERS.**

**T**HIS was an action of *assumpsit* brought by the payee against the maker of a promissory note, by which the defendant "promised to pay to the plaintiff on demand 20*l.*, with lawful interest until payment, for value received." At the trial before *Alderson*, B., at the *London* sittings after last *Michaelmas* Term, the note, when produced, appeared to be stamped with a stamp of 1*s. 6d.*, whereupon it was objected for the defendant that the stamp ought to have been 2*s.* instead of 1*s. 6d.* The learned Judge, however, overruled the objection, and the plaintiff obtained a verdict.

Where, by a  
promissory note  
*A.* promised to  
pay *B.* on de-  
mand 20*l.* with  
lawful interest  
until payment,  
for value re-  
ceived:—*Held,*  
that this was  
not a note pay-  
able to bearer  
on demand, but  
was a note pay-  
able otherwise  
than to bearer  
within two  
months after  
date.

*Gunning* now moved for a new trial on the ground that the stamp was insufficient. He cited *Keates v. Whieldon* (*a*), where it was held that a promissory note for 11*l.*, payable to *A. B.*, on demand, was a promissory note payable to bearer on demand within the meaning of the 55 Geo. 3, c. 184, and required a 2*s.* stamp.

**Lord ABINGER**, C. B.—That case has been very much doubted.

**PARKE**, B.—I think you will find that that case has been expressly overruled (*b*). A promissory note of this description falls within the second class of notes payable otherwise than to bearer, within two months after date.

**Rule refused.**

(*a*) 8 B. & C. 7.

(*b*) See *Cheetham v. Butler*, 2 Nev. & Man. 453; 5 B. & Adol. 837, S. C.

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HOPKINS v. DAVIES.

Upon a reference of a cause and all matters in difference, the arbitrators awarded that there was a balance of 26*l.* due from the plaintiff to the defendant, but did not order the money to be paid: the Court refused to grant an attachment for nonpayment thereof.

IN this case *E. V. Williams* moved for an attachment against the plaintiff for nonpayment of money purtenant to an award.

*R. V. Richards* shewed cause in the first instance. In this case there was a reference of the cause and all matters in difference between the parties, and the arbitrators awarded that there was no balance due from the defendant to the plaintiff, but that there was a balance of 26*l.* due from the plaintiff to the defendant. They, however, did not by their award order that sum to be paid. The award then goes on to direct that the costs and charges, amounting to 15*l.*, shall be paid by the plaintiff; but they do not say to whom they are to be paid, whether to the defendant or not. There being no order to pay the money, there cannot have been any contempt of the rule of Court. The award must shew that money is ordered to be paid, or it does not warrant the application for an attachment.

*E. V. Williams*, in support of the motion.—Undoubtedly, in *Edgell v. Dallimore* (a), where the award found the party to be indebted, but contained no order for him to pay the money, the Court of *Common Pleas* refused a rule for an attachment, on the ground that there being no order to pay, there could be no disobedience to the award. If the Court are inclined to follow that case, and to consider it as law, this motion, it is admitted, cannot be supported. The facts of that case do not appear, but the principle there stated is, that there being no order in the award, there could be no disobedience; but an attachment is not

(a) 11 B. Moore, 541; 3 Bing. 634, S. C.

granted on the ground of any contempt of the arbitrator's order, but for disobedience of the rule of Court, which directs that the parties shall abide by the award. If upon the award there is a sufficient ground to doubt the meaning of the arbitrators, there may be no contempt of the rule of Court; but here the party is in contempt for not abiding by the award, the meaning of which is clear. In the note to *Veale v. Warner* (*a*), it is said, "The Court of King's Bench, in the reign of Charles the Second, when Kelynge was Chief Justice, began to compel a performance of the award by attachment, as for a contempt of a rule of Court;" and *Stiles v. Treste* (*b*) is referred to. That case must have been decided soon after the practice was established. There the award was "that one should keep the goods, paying so much money to the other;" and the Court held that the meaning was, that the money should be paid, and that the award was good. [Lord Abinger, C. B.—There the award, if it amounts to any thing, is, that one shall have the goods and the other shall pay the money.] In *Cartwright v. Blackworth* (*c*), where the case of *Edgell v. Dallimore* was cited, Mr. Justice Littledale held that the arbitrator, by directing a verdict to be entered for 20*l.*, had done that which was tantamount to directing that sum of money to be paid by the defendant to the plaintiff. In this case, as no one on reading this award can fail to see the meaning of the arbitrator, the Court will grant the attachment.

**Lord ABINGER, C. B.**—I think, upon the authority of the case of *Edgell v. Dallimore*, we ought not to make this rule absolute. The award is evidence of a debt being due; but, as the arbitrator does not order the plaintiff to pay the money, I think he cannot be said to have com-

(a) 1 Wms. Saund. 327 c. (b) 1 Sid. 54.  
(c) 1 Dowl. Pr. Ca. 489.

*Exch. of Pleas,* mitted any contempt. If the award be valid, an action  
1835. may be maintained upon it.

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PARKE, B.—I think myself bound by the authority of *Edgell v. Dallimore*. If the matter were *res integra*, perhaps I should not have come to the same conclusion. But I do not see my way clear enough on the subject to say that that case is not law.

BOLLAND, B.—I think that *Edgell v. Dallimore* was properly decided, and that what is there stated by the Court is correct. Though an action may be maintainable on the award, yet, if no order to pay the money be expressed in it, how can we say that the party is in contempt?

Lord ABINGER, C. B., afterwards added—I do not say that if the matter were elaborately discussed, I might not be of a different opinion; but I incline to think that I should agree with the opinion of the Court of *Common Pleas*.

Motion refused.



#### POTTER v. MOSS.

This Court has no power to order judgment to be entered up *non obstante veredicto*, in an action in the *Common Pleas* at *Lancaster*, under 4 & 5 W. 4, c. 126.

IN this case, which was an action in the *Common Pleas* at *Lancaster*, *Wightman* moved, under the 4 & 5 Will. 4, c. 126, to enter up judgment *non obstante veredicto*.

PARKE, B.—It is quite clear, that, under the words of the act of Parliament, we have no power to order judgment *non obstante veredicto* to be entered up, where the action is brought in the Court of *Common Pleas* at *Lancaster*.

Rule refused (a).

(a) See *Byrne v. Fitzhugh*, ante, 598.

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1835.

**FOSTER and Another v. PEARSON and Others (a).**  
**STEPHENS v. FOSTER and Another (b).**

**T**HESSE two cases arose out of the same transaction which gave rise to the case of *Haynes v. Foster* (c).

*Foster v. Pearson* was tried at the *London* sittings after *Trinity Term*, 1832, before *Bolland*, B., when a verdict passed for Messrs. *Fosters*, the plaintiffs; and in *Michaelmas Term* ensuing, *John Williams*, for the defendants, obtained a rule for a new trial or for reduction of damages, on the grounds stated in the judgment of the Court.

*Stephens v. Foster*, which also arose out of the same

*W.* and *P.*, brokers in *London*, had in their possession bills of different customers to the amount of nearly 3000*l.*, which had been left with them to raise money upon. They mixed these bills with others of their own to about the same

amount, and deposited the whole with *Fs.*, who were merchants and capitalists, for an advance of 3000*l.* then made, and for a preceding advance made a few days before on a promise to bring bills. Evidence was given that it was usual and customary for bill-brokers in *London* to raise money by a deposit of their customers' bills in a mass, and that the bill-broker alone was looked to by the customer who gave the bill-broker dominion over the bill.

In an action brought by *Fs.* on one of the bills against one of the customers who was a party to the bill, the Judge left it to the jury to say whether *Fs.*, the plaintiffs, took the bills from *W.* and *P.*, the bill-brokers, with due care and caution and in the ordinary course of business; and the jury, being of opinion that they had so taken the bills, found a verdict for the plaintiff:—*Held*, that the defendant, the customer, could not complain of such summing up, and that the Court would not disturb the verdict.

In another action arising out of the same transaction, and which was an action of trover brought by one of the customers (who was himself also a bill-broker) against *Fs.* to recover the value of some of the bills, the Judge directed the jury that the principle laid down in *Haynes v. Foster*, that a bill-broker who receives a bill from a customer to procure it to be discounted, had no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself, and that still less had he a right to deposit such bill as a security or part security for money previously due from him, was to be taken by them as the general law; but that, notwithstanding such general rule of law, the parties might contract as they thought proper; and he left it to the jury to say whether the usage set up by the defendants as to the course of dealing in such cases was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill-broker himself, had contracted with reference to that usage; and the jury having found for the defendants, the Court refused to disturb the verdict.

A bill-broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.

*Semble*, that the old established rule of law, "that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them *bond fide* for value," is not to be qualified by treating it as essential that the person so taking them should take them with due care and caution; but that the person taking them *bond fide* for value, has a good title, though he take them without care or caution except so far as the want of such care and caution may affect the *bona fides* and honesty of the transaction.

(a) Assumpsit on several bills      (b) Trover to recover the value  
of exchange.      of several bills of exchange.

(c) 2 C. & M. 237.

*Exch. of Pleas*, transaction, was tried at the *London* sittings after *Hilary* Term, 1834, before Lord *Lyndhurst*, C. B., when a verdict passed for Messrs. *Fosters*, the defendants; and in *Easter* Term following, a rule for a new trial was obtained by *Bompas*, Serjt.

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In *Trinity* Term last, *Wilde* and *Coleridge*, Serjts., and *R. V. Richards*, for the plaintiffs in *Foster v. Pearson*, were stopped by the Court.

*Erle* and *Crompton*, for the defendants, were called on to support the rule; and the Court, after hearing them, said that they would hear *Stephens v. Foster* before they pronounced their judgment.

In *Michaelmas* Term last, *Stephens v. Foster* came on to be heard, when *Wilde* and *Coleridge*, Serjts., and *R. V. Richards*, for the defendants, were stopped by the Court; and,

*Bompas*, Serjt., *Crompton*, and *Dayman* were heard in support of the rule.—The Court said they would take time before pronouncing their decision, not from any doubt which they entertained, but for the purpose of delivering a deliberate judgment on a question of importance.

It is deemed unnecessary to state the facts and arguments, as they appear in the judgment.

*Cur. adv. vult.*

**PARKE**, B., now delivered the judgment of the Court:—These two cases were argued before Lord *Lyndhurst*, my Brothers *Bolland*, *Gurney*, and myself, in *Trinity* and *Michaelmas* Terms last, and stood over, not on account of any doubt that we felt at the time, but in order that the judgment of the Court upon a subject of much importance might be pronounced with due deliberation.

The facts of these cases, both of which, as well as that of *Haynes v. Foster*, arise out of the same transaction, may be stated in a few words. Messrs. *Fosters*, who are merchants, had large transactions with *Wood & Poole*, bill-brokers in the city of *London*. On *Monday*, the 14th *November*, 1831, *Wood & Poole* applied to them for an advance of 2000*l.*, offering bills as a security. Messrs. *Fosters* refused the bills offered, but advanced on that day the sum required, on an engagement by *Wood & Poole* to give bills to an adequate amount as a security, in a short time. On the 15th or 16th, a further sum of 550*l.* was lent on the same terms; and on *Saturday*, the 19th of *November*, *Wood & Poole*, in consequence of Messrs. *Fosters* requiring them to fulfil their engagement, placed bills to the amount of 5928*l. 7s.* as a security for the previous advance, and a further loan of 3000*l.* then made by Messrs. *Fosters* to them. There was contradictory evidence as to the time of this transaction. The jury found it to have taken place on the *Saturday*; and, as my Lord Chief Baron was satisfied with that finding, we must assume that it took place on that day. Among the bills so handed to Messrs. *Fosters*, were some to the amount of 502*l. 18s.*, the property of Mr. *Pearson*, the defendant in the last-named action, (comprising one for 192*l.* drawn upon one *Buck*); and also a bill belonging to Mr. *Stevens*, the plaintiff in the first-named action, and other bills, the subject of the suit in *Haynes v. Foster*, formed a part of the same deposit. The whole of the bills belonging to others were less than 3000*l.* in amount, and they had been previously placed by their respective proprietors in the hands of *Wood & Poole*, to be dealt with in their character of bill-brokers for the benefit of their employers. There was evidence on the trials of both the cases now under consideration, from numerous witnesses, that it was the usage of bill-brokers in the city of *London*, not merely to discount or pledge the bills of

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*Exch. of Pleas,* each customer by themselves for an advance on those bills only, but also to pledge bills of various customers together for an advance upon all of one gross sum; or even to pledge them as a security for antecedent advances made to the bill-brokers; and it was deposed that such was the known course of dealing in that city.

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v.  
PEARSON.

In the first case, in which the principal defence was, that Messrs. *Fosters* had taken all the bills of Mr. *Pearson* under such circumstances as did not entitle them to sue upon them, the learned Judge, my Brother *Bolland*, left it to the jury to say whether the plaintiffs took the bills from *Wood & Poole* with due care and caution and in the ordinary course of business; and the jury were of opinion that they did. A rule *nisi* was moved for and obtained, on the ground that the verdict was against the evidence, and also on two other grounds—one, the receipt of improper evidence—the other, that the plaintiffs had, at all events, no title to the bill for 192*l.*, and that the verdict therefore ought to be reduced by that amount.

In the second case, in which Mr. *Stephens*, who was himself a bill-broker, was the plaintiff, and sought to recover the amount of a bill from Messrs. *Fosters*, on the ground that they had acquired no title to it by the deposit by *Wood & Poole*, Lord *Lyndhurst* told the jury, that a bill-broker (being an agent for the purpose of getting bills discounted) has, *by the general law*, no right to mix a bill which he receives from one customer with bills which he receives from another, and pledge all for a gross sum: nor to pledge a bill which he receives for the purpose of discount, as a security for a past debt; but that, notwithstanding the general law, the parties might contract in any way they thought proper, and the customer give to the bill-broker more extended power. The defendant having in that case insisted that there was a known usage or course of dealing in the city of *London*, that, when a bill is put into the hands of a bill-broker, the customer gives him an

absolute dominion over the bill, to do with it as he likes, looking to the credit of the bill-broker only as the person responsible, either for the money, or for the return of the bill; his Lordship told the jury that they were to consider whether that usage was proved to their entire satisfaction to be universally prevalent in the city of *London*; and, if so, whether they thought that the plaintiff contracted with *Wood & Poole* according to that usage; that is, whether, in delivering the bill to them, he intended to give them an entire dominion over it, to do with it as they thought proper, looking to Messrs. *Wood & Poole*, and their responsibility, for their security, either to have the money from them or the bill back if they had not the money. The learned counsel for the defendants tendered a bill of exceptions to the summing up of the Lord Chief Baron, so far as it related to the general law, on which it became unnecessary to proceed, as the jury found a verdict for the defendants. A rule *nisi* was obtained on the part of the plaintiff for a new trial, on the ground that this verdict was against the evidence; and, on shewing cause against this and the rule in the other case, the questions in both were ably and elaborately argued.

With respect to the first action, the Court has already given some intimation of its opinion upon two of the grounds upon which the rule *nisi* was obtained. It will now be best to dispose of them altogether, and thus reduce the questions to one, which is nearly the same in both cases.

As to the receipt of improper evidence, it appears that the learned Judge admitted a note written by *Wood* and signed by *Poole*, addressed and sent to the defendant *Pearson*, and containing an account of the transaction similar to that which *Wood* gave on the trial; but it was admitted, not as proof of the facts therein stated, nor as confirmatory of *Wood's* testimony (for either of which purposes it would have been inadmissible), but only as

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*Exch. of Pleas,* proof of notice of those facts to the <  
1835. found an argument upon it, that he  
FOSTER v. of money from *Wood & Poole*, and  
PEARSON. them for another sum, had sanctioned  
deposit of the bills in question, as s<sup>t</sup>; this purpose the document was le, therefore this objection cannot preva

Another of the grounds upon wh obtained, was, that the verdict ought amount of the bill for 192*l.* on *Buck*, tended that the plaintiffs had at all e bill it appeared was part of those de tiffs on the 19th of November. On t Monday the 21st, this and all the o vered back by the plaintiffs to Me in order that a list might be made by drew the bill in question from the re consent of the plaintiffs, pledged it and he informed the plaintiffs on the substituted another bill for it. The and *Wood* promised to get the bill from Messrs. *Robarts & Co.*, by sati he redelivered the bill to Messrs. *Fos* after the stoppage of *Wood & Poole*.

It was argued for the defendant, t to the bill commenced on the re-d that time he could not be a bond as *Wood & Poole* had then become But it is quite clear that the plainti mence on the second, but on the fir to them; and, when it was returne *Wood* for a special purpose, his p and though the act of pledging the *Robarts & Co.* was a conversion by conversion by election. The plainti upon, either to consider *Wood* as a

cover damages from him for the wrong; or to waive the tort, and treat the property in the bill as still being their own. Messrs. *Robarts & Co.* might certainly have held the bill, if they, as no doubt they did, obtained the bill under such circumstances as gave them a right to hold it; but, as their title was at an end by the redelivery to *Wood*, that no longer interposed any difficulty in the way of the plaintiffs' title to the bill. On the removal of that difficulty the plaintiffs were remitted to their original rights.

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These objections being disposed of, I now come to the principal question in each case, *viz.* whether the verdict was against the evidence. In the case of *Foster v. Pearson* the learned Judge, as has been before stated, left it to the jury to decide whether the plaintiffs took the bills with due care and caution, and in the ordinary course of business; and the jury found that they did.

Of the mode in which the question was left, the defendant has certainly no right to complain; but, if the verdict had been in his favour, it would have become necessary to consider whether the learned Judge was correct in adopting the rule first laid down by the Court of *Common Pleas* in the case of *Snow v. Peacock* (*a*), and which was founded upon the *dicta*, rather than the decision, of the Judges of the *King's Bench* in the case of *Gill v. Cubbitt* (*b*), more especially since the opinion of the latter Court has been so strongly intimated in the late cases of *Crook v. Jadis* (*c*), and *Backhouse v. Harrison* (*d*). The rule of law was long considered as being firmly established, that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a *bond fide* holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in

(*a*) 11 Moo. 286; 3 Bing. 406.      (*c*) 3 N. & M. 257.

(*b*) 5 Dowl. & Ryl. 324; 3 B. & C. 466.      (*d*) Id. 188.

*Exch. of Pleas,* which care and caution in the taker of such securities has  
1835.  
been treated as essential to the validity of his title besides  
and independently of honesty of purpose. It is unnecessary, however, to decide that question at present; when it arises, as it will probably do under the new rules of pleading, on the record itself, it will be proper that it should be considered and finally decided with due deliberation.

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*v.*  
PEARSON.

Assuming, then, that the direction of the learned Judge was proper, the objection is, that on the evidence it was not established that the transfer of the bills to the plaintiffs was made to them in the ordinary course of trade, and that they exercised due care and caution.

The argument for the defendants was founded on the authority of *Haynes v. Foster* (*a*), which case, it was contended, established this proposition as a *rule of law*—that a bill-broker who receives a bill merely for the purpose of getting it discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass; still less to deposit such bills as a security for money previously due from him. It was insisted that it was dangerous to permit this rule of the general law to be varied by proof of a custom, or, more properly speaking, an usage in a particular place, and that the usage set up by the plaintiffs was at variance with the relation of the parties, and therefore void; that it was either too large or too narrow; that, if it went the length of allowing the broker to pledge for his own prior debt, it was bad in point of law, as being inconsistent with his character of agent; and, if it did not go so far, it was not sufficient for the purposes of this case, and did not authorize the transactions in question. And it was further urged, that, if the usage was not invalid, at all events it was not proved by clear and satisfactory evidence.

In answer to this argument it is to be observed, that, so far as it relates to the power of a bill-broker to pledge the

bills of his customers for an antecedent debt of his own, it is beside the present case, that of *Foster v. Pearson*, for two reasons; first, because, although the deposit of all the bills was made for the double purpose of securing the past debt and the present advance, yet the amount of customers' bills pledged was less than the actual advance made. Therefore, assuming for the sake of argument that the plaintiffs, who knew that *Wood & Poole* were bill-brokers, ought to have inquired which were customers' bills and which not, and that, having neglected to do so, they are to be held to be in the same situation as if they knew the real state of the facts, the result would be the same as if they had knowingly taken a pledge of bills the property of *Wood & Poole* to the amount of 4000*l.*, and the property of their customers to the amount of 2000*l.*, expressly to secure an old debt of *Wood & Poole* of 2500*l.*, and a fresh advance of 3000*l.*; and, on that supposition, there could not be any doubt but that they would have had a lien on all for their advance, and on *Wood & Poole's* own bills for the old debt. In such a case there would not have been any such fraud or illegality as would have vitiated the whole transaction with respect to the customers' bills, but the customers would have had a right jointly to redeem them on payment of the sum advanced only.

A second reason why it is unnecessary to decide in this case upon the validity of the usage for a bill-broker to pledge for his antecedent debt, is this, that, assuming the broker to have no such power between him and his employer, or as to third persons, who receive the bills with knowledge of *all* the facts, it by no means follows that in the present case Messrs. *Fosters* would not have a right to hold the bill; for, the question here is, whether they took the bills with due care and caution and in the ordinary course of business. The jury have found that they did, and can we say that they did not, even though we should think that the broker had not a right so to

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*Exch. of Pleas.*, pledge the customers' bills? Messrs. *Fosters* might have supposed that *Wood & Poole* were acting rightly in pledging their customers' bills, even if they knew them to be such, for their prior advance, because *Wood & Poole* might have given to those very customers a part of the 2500*l.*, the amount of that prior advance. Were Messrs. *Fosters*, as men of business using due care and caution, bound to ask *Wood & Poole*, not only whether any and which were the customers' bills, but whether they had made any advances out of the loan to them or otherwise, and to what amount, on any of those bills? Whether such a course ought to have been pursued by men of business was entirely a question for the jury.

The validity of the alleged usage, so far as it relates to the power to pledge for an antecedent debt, being therefore out of the question in this case, it remains to consider whether there is any objection to the verdict on the ground that the residue of the alleged usage was either invalid in point of law or defectively proved.

The judgment in the case of *Haynes v. Foster* is treated in the argument for the defendant as establishing that it is a sort of *legal incident* to the character of a bill-broker, that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connexion with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill-broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth, a bill-broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country, it may have powers more or less extensive in one place than in another; what is the

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nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place. A great body of evidence was adduced in the present case to prove that it was the course of dealing in the city of *London* for bill-brokers to raise money for their employers, by pledging the bills of different proprietors for one entire advance; and there is nothing unreasonable in such a practice. On the one hand, it is attended with inconvenience, because one proprietor may have to answer for the nonpayment of another's bill; but, on the other hand, it may give facilities to the raising of money on negotiable paper, for it may well happen that a great capitalist would advance money in this way who would not discount each particular bill; but at any rate it is found to be the ordinary usage and practice so to dispose of bills; and the question in the case being, whether Messrs. *Fosters* acted with due care and caution and in the ordinary course of business in receiving these bills, how can it be said that the jury were wrong in finding what they did, when there was such a body of evidence to shew that they acted precisely in the same way that bankers and other merchants of respectability were in the habit of acting, men who must be presumed to conduct their affairs with ordinary care and with due circumspection? What greater caution can be required from any man of business? What different conduct can be expected than that which other men of business, of character, and of intelligence, employ in similar transactions? What better criterion can be found of ordinary care, than that measure of care ordinarily used by other persons in the same department of trade similarly situated?

This was a question entirely for the consideration of the jury. They have decided upon it; and we cannot say their decision is wrong. It is true that it is at variance with the conclusion to which the jury came in the case of

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*Exch. of Pleas,* *Haynes v. Foster;* but in that case there was no such evidence of the ordinary course of dealing as there was in this.

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It remains to consider whether there is any difference between the case of *Foster v. Pearson* and that of *Stevens v. Foster*.

The question was not left to the jury in the same way in the latter as in the former case. It was put on the ground that the jury might infer from the usage proved, and its general notoriety, that the customer employed the bill-brokers with reference to that usage, and therefore authorized them to deal with the bills as they in fact did; and the jury were satisfied with the evidence, and did draw the inference that Messrs. *Wood & Poole* had authority as between them and their employers to pledge the bills in the manner in which it appears that they did. It was argued for the plaintiffs, that the usage given in evidence was not sufficient to prove such a right as between bailor and bailee, and more particularly to deposit bills of the bailor as security for an antecedent debt due from the bailee. This was the principal objection, and it may be removed from this case as well as from the other, for it has been shewn to be unnecessary to the title of Messrs. *Fosters* to establish the usage to that extent; because an advance was made at the time to an amount exceeding that of the customers' bills. So far as the usage tends to shew an authority to pledge bills in a mass, and not separately, its reasonableness is hardly disputed; and that question has also been already disposed of. It was proved to be the prevailing practice, and it is enough for us to say the jury were warranted in drawing the inference which they did, especially as the plaintiff was himself a bill-broker.

Indeed, the question in this case was left to the jury in a manner which gives the plaintiff no right to complain; if the verdict had been the other way, the defendants might possibly have done so with success; for, whether the plaintiff actually or by implication authorized the brokers

so to deal with the bills or not, still, if the defendants took the bills for value, and honestly and with due care and caution, in the ordinary course of business (and even that is probably an unnecessary qualification), they would have a good title to hold them; and less evidence of the practice of men of business would most likely have satisfied the jury if this had been the question left to them, than was necessary to raise the inference of an authority as between principal and agent. We are therefore of opinion that both these rules must be discharged.

Eccles. of Pleas,  
1835.  
FOSTER  
v.  
PEARSON.

Rules discharged.

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### HEBBERT v. THOMAS and Another.

**TRESPASS** for breaking and entering a certain close of the plaintiff next adjoining certain workshops and premises in the possession of one *J. Swan* on one side thereof, and adjoining certain land in the possession of the defendant *William Thomas* on the other side thereof, and situate in the parish of *St. Martin*, in *Birmingham*, in the county of *Warwick*, and also two other closes of the plaintiff in the parish aforesaid, and a certain other close of the plaintiff in *Birmingham*, in the county aforesaid, and breaking certain doors, gates, locks, &c.

The defendants pleaded—*first*, Not guilty—*secondly*, That the defendant *William Thomas*, long before and at the several times when &c., was the lawful occupier of certain premises, with the appurtenances, situate in the

*A.*, the owner of certain freehold houses and land with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In trespass by one of the tenants against the landlord for excluding him

from the yard, the Judge left it to the Jury to say whether the landlord at the time of the demise had reserved the yard:—*Held*, that this was a misdirection, the question being whether he had demised it, and not whether he had reserved it.

*Bach. of Pleas,* county aforesaid; and that the said defendant *William Thomas*, and the other occupiers of the said last-mentioned premises for the time being, for and during the full period of twenty years next before the commencement of the suit, had respectively, as of right, and without interruption, had, used, and actually enjoyed, and at the several times when &c., the defendant, *William Thomas*, of right ought to have had, used, and enjoyed, a certain way for himself and themselves, and his and their servants, to pass and repass on foot from a certain public street in the county aforesaid, called *Smallbrook Street*, into, through, and over the said closes in which &c., unto the said premises of him the said defendant *William Thomas* in this plea aforesaid; and also from the said last-mentioned premises unto, into, through, over, and along the said closes in which &c., into the said public street there, at all times of the year, at his and their free will and pleasure, as to the said premises of the said defendant *William Thomas* belonging and appertaining, wherefore &c., the defendant *Thomas*, and the other defendant *Richard Freeman*, as his servant and by his command, justified using the way &c., and breaking the gates, because they obstructed the way &c.; which were the trespasses in the said declaration mentioned.

Replication—traversing the right of way, and new assignment *extra viam*.

Plea to new assignment—a right of way, as appertaining to a messuage and premises occupied by the defendant *W. Thomas*, as in the second plea.

Replication—traversing the right of way, and issue thereon.

At the trial before *Park, J.*, at the *Warwick Summer Assizes*, 1834, it appeared that the action was brought to try the question whether the *locus in quo*, which consisted of a narrow passage, was the sole and exclusive property of the plaintiff, or whether it was not the property of the

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Thomas.*

defendant *Thomas*, or whether the defendant *Thomas*, as the occupier of other premises adjoining, had not at least a right of passage over the same. The plaintiff was the owner in fee of certain dwelling-houses, shops, and other premises in a street called *Smallbrook Street*, in the town of *Birmingham*. The defendant *Thomas* was the lessee for a long term of years from the plaintiff of other mesuages and premises adjoining the plaintiff's premises. The *locus in quo* was a yard adjoining to the latter premises. A pump and a privy in this yard were used by the tenants of the latter premises. There was evidence of repairs done by the plaintiff to the pump. It did not appear in fact whether the *locus in quo* had been demised; but it was insisted for the defendants, that, from the circumstance of the tenants using it, the presumption was that it had been demised. The learned Judge left it to the jury to say whether they were of opinion, that, at the time of the demise of the other premises, the lessor had reserved the *locus in quo*. The jury having found a verdict for the defendants, *Goulburn*, Serjt., obtained a rule to shew cause why there should not be a new trial, on the ground of a misdirection by the learned Judge.

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*Hill* and *Humfrey* now shewed cause.—There was no misdirection on the part of the learned Judge. From all the circumstances of the case, from the manner in which the *locus in quo* was used by the tenants of the various houses demised, and from there being a common privy and common pump in the yard, there was sufficient evidence from which the jury might have presumed that the yard was demised together with the adjoining premises. It was therefore a proper question whether the lessor had or had not reserved to himself the *locus in quo*.

*Goulburn*, Serjt., *Amos*, and *Gale*, contr<sup>d</sup>, were stopped by the Court.

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1835.

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*v.*  
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**Lord ABINGER, C. B.**—The tenants of the several houses appear to have held under parol contracts, and the question, upon the point of misdirection, is this, whether the lessor can be said to have *reserved* the *locus in quo*, merely by not demising it. I think he cannot. It ought to have been left to the jury to find, not whether or not the landlord had reserved the *locus in quo*, but whether he had ever demised it. The presumption is, not that the *locus in quo* passed as part of the demised premises, but that the landlord gave to each of the lessees of the houses an easement.

**PARKE, B.**—It is admitted that the soil and freehold of the *locus in quo* are in the plaintiff, and the possession also must be presumed to be in him until some evidence is given to the contrary. The point is, whether the learned Judge directed the jury to that effect, which he does not appear to have done. No reservation was required in order to keep the possession in the lessor; it was sufficient if he did not demise.

Rule absolute.

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#### RUSSELL *v.* COWLEY and Another.

A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of man-

**CASE** for the infringement of a patent. Plea—the general issue. At the trial before Lord *Lyndhurst*, at the sittings after *Hilary Term*, 1834, it appeared, that, in the year 1825, one *Cornelius Whitehouse* took out a patent for certain improvements in manufacturing tubes for gas and other purposes, and in the course of the same year

manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril:—*Held*, that the Court, taking the whole of the latter specification together, would infer that the maundril was not to be used, and that the latter patent was good.

assigned the patent to the plaintiff. A great mass of evidence was given on both sides upon the facts of infringement, but upon this point ultimately no question arose. On the close of the defendant's case, they put in evidence a patent granted in the year 1812, to *Henry James* and *John Jones*, for "an improvement in the manufacture of barrels of all descriptions of fire-arms and artillery;" which, it was contended, included the principle of the plaintiff's patent. The question turning upon the construction of the two specifications, they are both stated. That of *Whitehouse*, assigned to the plaintiff, was in the following terms—

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" To all to whom these presents shall come: I, *Cornelius Whitehouse*, of *Wednesbury*, in the county of *Stafford*, whitesmith, send greeting: Whereas his present most excellent Majesty, King *George* the Fourth, by his letters patent under the great seal of *Great Britain*, bearing date at *Westminster*, the twenty-sixth day of *February*, in the sixth year of his reign, did for himself, his heirs, and successors, give and grant unto me, the said *Cornelius Whitehouse*, his especial licence, that I the said *Cornelius Whitehouse*, my executors, administrators, and assigns, or such others as I, the said *Cornelius Whitehouse*, my executors, administrators, and assigns should at any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend within *England*, *Wales*, and the town of *Berwick upon Tweed*, my invention of "certain improvements in manufacturing tubes for gas and other purposes:" in which said letters patent there is contained a proviso obliging me, the said *Cornelius Whitehouse*, by an instrument in writing under my hand and seal, particularly to describe and ascertain the nature of my said invention, and in what manner the same is to be performed, and to cause the same to be inrolled in his Majesty's

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High Court of *Chancery* within six calendar months next and immediately after the date of the said in part recited letters patent, as in and by the same, reference being thereunto had, will more fully and at large appear. Now know ye, that, in compliance with the said proviso, I, the said *Cornelius Whitehouse*, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, are particularly described and ascertained in and by the drawing hereunto annexed, and the following description thereof, that is to say:—My improvements in manufacturing tubes for gas and other purposes consist in heating the iron of which such tubes are to be made, in a blast furnace, and, immediately after withdrawing them from the furnace, passing them through swages or other such like instruments in manner following: I prepare a piece of flat iron, commonly called plough plate iron, of a suitable substance and width, according to the intended calibre of the tube; this piece of flat iron plate is prepared for welding by being bent up on the sides, or, as it is commonly called, turned over, the edges meeting or nearly so, and the piece assuming the form of a long cylindrical tube. This tube is then put into a hollow fire heated by a blast, and when the iron is upon the point of fusion it is to be drawn out of the furnace by means of a chain attached to a draw-bench, and passed through a pair of dies, of the size required, by which means the edges of the iron will become welded together. The apparatus which I employ for this purpose is shewn in the drawing at fig. 1, which is a side view of the furnace *a*, and of the draw-bench *b*, with its spur wheel *c*, which may be put in operation by a hand winch, or by attaching its axle to the moving part of a steam-engine; *d* is a screw-press, in which the dies are placed for swaging and uniting the edges of the iron tube *e*, as it passes through. A front view of this screw-press with its dies is shewn at fig. 2, and one of the dies removed from

the press is shewn at fig. 3. The iron tube *e*, having been heated to the point of fusion in the blast furnace *a*, is drawn out by the chain of the draw-bench, and the screw of the press *d* being turned so as to bring the dies to their proper point of bearing, the two edges of the iron become pressed together, and a perfect welding of the tube is effected. The screw-clamp or other fastening, *f*, by which the end of the tube is held and attached to the chain, is now opened, and the tube removed: the reverse end of the tube is then grasped by it, and that part which has not been welded is introduced into the furnace, and after being heated is drawn through the dies and welded in the manner above described. The process of welding these tubes may be performed without the screw-press and dies above described. A pair of pincers, as shewn at fig. 4, may be employed instead, having a hole for the tube to pass through similar to the dies; one arm and chap of these pincers is shewn at fig. 5, for the purpose of exhibiting the conical figure of the hole which the tube is to pass through. As the tube *e* is drawing out of the furnace by the chain of the draw-bench, a workman brings the pincers and takes hold of the tube, resting the pincers against the standard *d* as a steadyng place; and as the tube passes through the hole of the pincers, the welding of the edges of the iron is effected. I have thus described the modes which I have employed and found fully to answer the purpose in welding tubes of iron; but I do not confine myself to the employment of this precise construction of apparatus, as several variations may be made without deviating from the principles of my invention, which is to heat the previously prepared tubes of iron to a welding heat, that is, nearly to the point of fusion, and then, after withdrawing them from the fire, to pass them between dies or through holes, by which the edges of the heated iron may be pressed together and the joint firmly welded. The advantages of this tube compared with those

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made in the ordinary way are these : the iron is considerably improved by the operation of the hollow fire, the heat being generally diffused ; the length of the pieces of tube thus made is likewise a great advantage, as by these means they may be made from two to eight feet long in one piece ; whereas, by the old modes, the length of tubes cannot exceed four feet without considerable difficulty, and consequently an increased expense. These tubes are likewise capable of resisting greater pressure, from the uniformity of the heat throughout at which they have been welded ; and, lastly, both their internal and external surfaces are rendered smooth and greatly resembling drawn lead pipes. In witness," &c.

*James and Jones's specification ran as follows :—*

" To all to whom these presents shall come : We, *Henry James* and *John Jones*, of *Birmingham*, in the county of *Warwick*, send greeting. Whereas his most excellent Majesty King *George* the Third did, by his letters patent under the great seal of the united kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster*, the 26th day of *July*, in the fifty-first year of his reign, give and grant unto us, the said *Henry James* and *John Jones*, our executors, administrators, and assigns, his special licence, full power, sole privilege and authority, that we the said *Henry James* and *John Jones*, our executors, administrators, and assigns, during the term of years therein expressed, should and lawfully might make, use, exercise, and vend, within *England*, *Wales*, and the town of *Berwick upon Tweed*, and also in his Majesty's colonies and plantations abroad, our invention of 'an improvement in the manufacture of barrels of all description of fire-arms and artillery,' in which said letters patent there is contained a proviso, that if we the said *Henry James* and *John Jones*, or one of us, shall not particularly describe and ascertain the nature of our said

invention, and in what manner the same is to be performed, by an instrument in writing under our hands and seals, or the hand and seal of one of us, and cause the same to be inrolled in his Majesty's High Court of *Chancery*, within six calendar months next and immediately after the date of the said letters patent, that then the said letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void, as in and by the said letters patent, relation being thereunto had, may more fully and at large appear. Now know ye, that in compliance with the said proviso, we the said *Henry James* and *John Jones* do hereby declare that our said invention is described, ascertained, and performed in manner following, that is to say:—Take a skelp or piece of iron adapted for the purpose of making barrels for muskets or any other fire-arms; let it be turned or brought into a form proper for welding; heat it in an air or reverberatory furnace, or a hollow fire, or any other fire proper for the purpose, and which is to be so constructed as to give a regular welding heat to one half of the barrel at a time, or to any other given proportion desired; when it is heated to a proper welding heat, the maundril or stamp is to be expeditiously put into it, and the barrel placed or held on an anvil or swage grooved to fit the form of it, upon which several hammers, worked by steam, water, or any other mechanical power, are caused to fall or strike with great velocity upon such portion of the barrel desired to be welded; and when sufficiently welded and hammered, which would be well known to a person accustomed to weld gun barrels, the stamp or maundril is to be quickly struck out, before the hot barrel has time to contract too close or adhere upon it, to prevent the stamp or maundril from being got out while the barrel is hot: but should that be the case, the barrel must be left until it is cold, when it should be lightly hammered, which will cause the barrel to expand a little round the stamp or maundril,

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and loosen it sufficiently to come out; and for the purpose the better to facilitate the getting out of the stamp or maundril from so large a portion of the barrel welded at a time, let the stamp or maundril be made of as regular smooth and perfectly round form as possible, and of a gradual gentle taper from heel to point. The number, weight, and velocity of the hammers may be varied according to the description of barrel desired; but for musket barrels, which are generally from three feet three inches to three feet six inches long, when it is wished to weld them at two heats, we recommend six hammers: the hammers should be ranged in a straight line, side by side, as true and as close together as they will work free, and covering a space in length of about twenty inches, and in width about four or five inches. They should work very true upon the swage or anvil, and rise and fall together, or nearly together, or alternately; the faces of the hammers may be either even or hollowed out a little in those parts which fall upon the barrel when welding. The hammers may be fixed, connected, and worked by machinery, according to any of the well-known methods of working hammers. Or, instead of welding the barrels by hammers as before described, they may be welded between a pair of rollers grooved to fit the form of the barrel, the rollers having either an alternate or rotatory motion, and worked by steam, water, or other mechanical power; but we consider the hammers to be the best method, as making the soundest and most perfect barrels: in either way, care should be taken to have the edges, seams, or points of the skelp or piece of iron placed true together, to give the iron a regular welding heat, and to put in and take out the stamp or maundril as quick as possible. The advantages of our aforesaid method of heating barrels in a hollow fire, or an air or reverberatory furnace, and welding them by hammers or rollers worked by machinery, is, that

we are enabled to make them much sounder, and more accurately and expeditiously than they are at present made: we prevent cinders, ashes, or dirt, from getting into the inside of the barrels, or between the welding seam or joint, which now often happens, and which causes the barrels to bore black, or otherwise prove unsound. Our invention also extends to the turning of all kinds and descriptions of barrels for muskets or other fire-arms, in an improved turning machine or lathe, with cutters or sharp steel instruments or tools, worked by machinery with steam, water, or any other mechanical power. The turning machine or lathe is constructed and worked as follows."

The specification then proceeds to set out a new mode of turning gun barrels claimed by the patentees, but not material to the consideration of the question of welding.

The jury having found a verdict for the plaintiff, the learned Judge gave the defendants leave to move to set aside the verdict and enter a nonsuit; in pursuance of which a rule to that effect was obtained in *Easter Term*, which came on to be argued in *Michaelmas Term*, 1834(a), when

Sir *James Scarlett, Rotch, and Follett*, shewed cause, and argued, at considerable length, the question of infringement, but ultimately the judgment of the Court did not turn upon that point.—The matter for the consideration of the Court is this, whether *James & Jones's* patent, upon mere inspection, without a single witness, or any evidence whatever tendered in explanation of it, necessarily shews that the invention claimed by the plaintiff is not new. It is contended that the plaintiff's method of welding, by passing the tubes through a die, is the same as that of welding by rollers, described in *James & Jones's* specification:—"or instead of welding the barrels by ham-

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(a) The report of this case has been unavoidably deferred.

*Exch. of Pleas,* mers as before described, they may be welded between a  
1835. pair of rollers grooved to fit the form of the barrel, the  
RUSSELL rollers having either an alternate or rotatory motion, and  
*v.* worked by steam, water, or other mechanical power; but  
COWLEY. we consider the hammers to be the best method." Shall  
the plaintiff's patent be defeated by what is a mere speculation, as to the possibility of pipes being welded by passing them through a roller? Suppose that in some old treatise on the manufacture of iron a suggestion were found that pipes might by possibility be welded by passing them through rollers, could it be contended that this would invalidate the patent? and yet nothing more is done in *James & Jones's* specification. To substantiate the defence the rollers themselves ought to have been produced at the trial, and shewn to be the same in effect and power as the die. There is a great difference between the operation of the roller and the die. In using the roller, all parts of the tube have not an equal pressure at the same time; and the larger the tube, the greater the imperfection in its manufacture. The use of the maundril, also, is another important distinction between the two methods. It was proved that the maundril could not be used in the manufacture of a tube of any length, and the reason is that the instrument is obliged to be withdrawn while the tube is still very hot. It is impossible, consequently, to manufacture tubes with the maundril of greater length than a fowling-piece. In another particular, also, the die differs from the roller. The dies have a conical or bell mouth to admit the tube being of larger dimensions when it goes in than when it comes out. This cannot be effected by means of rollers. The pipe in passing through the die assumes a diminished form. This is an essential part of the principle of the plaintiff's patent, and the operation of the roller in revolution cannot embrace any part of that principle. [Lord Lyndhurst, C. B.—Suppose a patent had been taken out for welding tubes by means of rollers,

could there not have been another for effecting that object by means of fixed dies?] Certainly there could. [Parke,  
 B.—The plaintiff's patent is for drawing tubes through fixed dies without the use of the maundril. If so, it is not the same as *James & Jones's* patent. Lord *Lyndhurst*, C. B.—It is the same as if the specification had stated that the operation was to be effected without the assistance of a maundril. If the words "without a maundril" had been inserted in the specification, would not that have shewn the invention to be perfectly new?]

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The *Attorney-General*, *Platt*, and *Richards*, contra.—The specification claims too much, and the plaintiff seeks to appropriate to himself what is not a new invention. The real question is this, is the invention claimed that of welding tubes by means of circular pressure? It is perfectly immaterial whether that pressure is applied by drawing an instrument through the tube, or the tube through an instrument. At the trial it was assumed that the two modes were the same in effect, and the question made was whether there had been an infringement. The defendant's mode of welding was that by means of rollers. That circular pressure in general is the principle claimed by the plaintiff appears from the following part of the specification:—"I do not confine myself to the employment of this precise construction of apparatus, as several variations may be made, without deviating from the principles of my invention, which is to heat the previously prepared tubes of iron to a welding heat, that is, nearly to the point of fusion, and then, after withdrawing them from the fire, to pass them between dies or through holes, by which the edges of the heated iron may be pressed together, and the joint firmly welded." [Lord *Lyndhurst*, C. B.—"Them" means the prepared tubes of iron, that is, tubes without a maundril.] The operation, as described, depends upon the drawing of the tube, whether there be a maundril or

*Exch. of Pleas,* not. In the operation of the rollers it is the same as if the tube passed through a hole; and this specification in fact claims the system of the roller, which produces a hole through which the tube is passed. According to the specification, what is there to prevent the plaintiff from using the roller to effect the welding instead of the die?

  
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The principle, then, claimed by the specification being that of welding by means of concentric pressure, is the same as that of *James & Jones's* patent. Their specification states that "instead of welding the barrels by hammers as before described, they may be welded between a pair of rollers grooved to fit the form of the barrel, the rollers having either an alternate or rotatory motion, worked, &c." [Lord *Lyndhurst*, C. B.—The material point for you to establish is that *James & Jones's* patent included welding without the use of the maundril. If the maundril is inserted, where is the difference between producing it by pressure and producing it by the hammer?] *James & Jones*, in their specification, shew a method according to which, by passing the tube through a hole, the welding is complete, and, according to the plaintiff's own evidence, the effect of the roller and of the die is the same in producing the welding. [Parke, B.—The question is, whether the plaintiff claims the invention of welding without the assistance of any internal substance. It is quite clear to me that any man of intelligence, reading the specification, must see that the patentee claims to effect his invention without the application of any internal substance, and the only point is, whether the general words at the end of the specification include too much.] Lord *Lyndhurst*, C. B.—It is obvious that the patent excludes the use of the maundril. This appears from the latter part of the specification, in which the effects of the new invention are stated. The greater length of the tubes shews that the maundril is not intended to be used. The particular

description excludes the use of it, and the general description, taking it in connexion with the effects stated, likewise excludes it.] After all, the question amounts to this, whether *James & Jones's* patent does not come within the large principle claimed by the plaintiff's specification. Suppose *James & Jones's* patent had been posterior to that of the plaintiff, would it not have been contended to be an infringement?

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Lord LYNDHURST, C. B.—Without any question this invention is ingenious and useful; and the point upon which the validity of the patent depends is, whether it claims to manufacture the pipes without the use of the maundril, in which case it would be a new invention. Does it claim to make the pipes without a beating or pressure on any hard substance? It is said, on behalf of the defendants, that the specification includes too much, and that the principle of the invention claimed is in fact not new; but it appears to me, as I have already stated, that the specification claims the invention of welding tubes without the use of the maundril. As I read the specification, the maundril is excluded both in the particular and in the general description. The particular description states that "as the tube is drawing out of the furnace, a workman brings the pincers and takes hold of it, resting the pincers against the standard as a steady place; and, as the tube passes through the hole of the pincers, the welding of the edges of the iron is effected." Here, then, the manufacture of the tube is complete, and this description precludes the idea that internal support is afforded. The distinction between this and the former mode of manufacture is, that according to the former mode, there was some substance inserted in the tube to support the external pressure. Then is the meaning of this clause altered by the general description at the conclusion of the specification? The patentee there states his principle to be to

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1835.

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heat "the previously prepared tubes." He then describes the effects, and in pointing out the advantages of his invention, as in the length of the tubes, &c., those advantages appear to be inconsistent with the use of the maundril. I think, therefore, that the plaintiff's patent is good, as being limited to the welding of tubes without the use of internal support. He has not extended his claim to any thing which is not in fact his own invention.

**PARKE, B.**—I am of the same opinion. It appeared to me throughout the argument that this is merely a question of construction, arising upon the specification. If, as contended by the Attorney-General, the patent claims the invention of welding by circular pressure, then it is clearly void; but if the plaintiff only claims a limited and particular mode of effecting that object, then it is certainly new. It appeared to me, on reading the specification, that it only claimed the limited mode, *viz.* that of welding pipes, by passing them through a circular die without the application of the maundril. In the construction of a patent, the Court is bound to read the specification so as to support it, if it can fairly be done. Taking the whole effect of the specification together, it is clear that it was intended to exclude the maundril. I am happy that the Court is enabled to come to this conclusion, so as to secure to the plaintiff the fruits of an ingenious and useful invention.

**ALDERSON, B.**—I also concur in the opinions which have been delivered. The plaintiff's claim is confined to the invention of drawing a hollow tube through a die for the purpose of welding it. The description of the mode of manufacture commences by stating the heating of the iron, from which the tubes are to be made, in a furnace. The iron plate is prepared for welding by being bent upon the sides, the edges meeting or nearly so, and the tube is

then put into a hollow fire, &c. Now, in this statement there is nothing whatever said of the introduction of a maundril, while in *James & Jones's* patent, on the contrary, it is expressly said that when the tube is heated to a proper welding heat, the maundril or stamp is to be expeditiously put into it. The question is, whether a person of due experience, on reading the plaintiff's specification, would not know that the claim was intended to be confined to the making of tubes without the use of the maundril. We ought not to be astute to deprive persons of the benefits to be derived from ingenious and new inventions. I concur in the construction put upon the specification by the Lord Chief Baron and my brother *Parke*.

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GURNEY, B., also concurring—

Rule discharged.

*Note.—This case was decided in Michaelmas Term.*

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JENKINS v. HARVEY.

**ASSUMPSIT.**—The first count in the declaration stated, that the borough of *Truro* in the county of *Cornwall* is an ancient borough, and the port of the said borough is an ancient port, and that the mayor and burgesses of the said borough and their predecessors for the time being, from time whereof the memory of man is not to the contrary, have had and exercised, and been used and accustomed to have and exercise, and still of right ought to have and exercise, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the

The corporation of *Truro* in 1795 made a lease of the office of Meter with all fees, emoluments, &c. arising from the measuring of coal, &c. imported. It was proved that they had been accustomed for nearly sixty years to receive these payments upon

all coal imported into the port. The learned Judge told the jury that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not expressly advise them that they ought to make such presumption, unless some evidence to the contrary appeared, neither did he explain to the jury the nature of a port duty, and state, that as such the claim in question might be referred to a modern grant. The Court granted a new trial.

*Eccles. of Pleas,* said mayor and burgesses for the time being, or their deputy or deputies, servant or servants, a certain ancient office or place of meter, for (amongst other things) the measuring of all coal imported by sea and brought within the limits of the port aforesaid to be there unloaded, delivered, or disposed of. And also that from time whereof the memory &c., there hath belonged, and still doth belong, to the said mayor and burgesses of the said borough, and their predecessors, or their lessee or lessees, farmer or farmers, for the time being, by reason of the said office, a certain ancient fee, reward, perquisite, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, and other machines and conveniences, for the purpose of measuring, i. e. the fee, reward, or toll of 4*d.* for the chaldron to be had and received for the measuring, or being ready and willing to measure by measure, each chaldron of coal aforesaid imported by sea and brought within the port aforesaid, and deliverable, or to be unloaded, delivered, or disposed of by measure, and the fee, reward, or toll of 8*d.* by the three tons to be had and received for the weighing, or being ready and willing to weigh, each three tons of coal imported and brought as aforesaid, deliverable, or to be unloaded, delivered, or disposed of as aforesaid by weight: the said fees, rewards, or tolls to be received and taken by the said mayor of the said borough for the time being, or the lessee or lessees, farmer or farmers, of the said mayor and burgesses for the time being, or his deputy or deputies, servant or servants thereof. That heretofore, and before the making of the promise and undertaking therein after mentioned, to wit, on the 25th day of November, 1795, in the county aforesaid, the said mayor and burgesses, &c. being so entitled to the said fee, reward, or toll, and the said office as aforesaid, by a certain indenture then and there made between *Edward Lawrence*, gent., then being mayor of the said borough of *Truro*, and the burgesses of the said borough,

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of the one part, and the said *Silvanus Jenkins* of the other part, (the counterpart of which indenture, sealed with the common seal of the said borough, the plaintiff's executrix as aforesaid brings into Court), the said mayor and burgesses, for the considerations therein mentioned, did grant, demise, lease, set, and let unto the said *Silvanus Jenkins*, his executors, administrators, and assigns, the said office or place of meter of the said borough, together with all advantages, profits, emoluments, fees, perquisites and rewards whatsoever arising or accruing from the measuring of all corn and grain, coals, culm, and other such like commodities, that should be exported or imported within the limits of the port of the said borough, in such sort and manner as the same was then or had been formerly paid and enjoyed, and all the rights and privileges thereunto belonging or appertaining, to have and to hold, exercise, and enjoy the said office or place of meter of the said borough, with the appurtenances as aforesaid, unto the said *Silvanus Jenkins*, his executors, administrators, and assigns, for and during and unto the full end and term of ninety-nine years fully to be complete and ended, if *Louisa Bowen Jenkins*, then aged four years or thereabouts, daughter of the said *Silvanus Jenkins*, should so long live. The said term to commence from and immediately after the death of one *Peter Tippet* and *Edward Tippet* his brother, or the surrender, forfeiture, or other sooner determination of the then term, &c. of the said *Peter Tippet* of and in the same, determinable on their death; he the said *Silvanus* yielding and paying therefore as in the said indenture mentioned, *3l.*, payable quarterly. That afterwards, and during the said term of ninty-nine years by the said indenture granted, and during the life of the said *Louisa Bowen Jenkins*, to wit, on the 1st of January, 1820, in &c. the said *Peter Tippet* and the said *Edward Tippet* died, and that thereupon, by virtue of the said demise, the plaintiff as executrix as aforesaid, afterwards

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*Eccles. of Pleas,* and during, &c. to wit, entered into and upon the said  
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JENKINS and was possessed thereof, as executrix as aforesaid, for  
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his executors thereof granted as aforesaid, he the said  
*Silvanus* having previously and during, &c., to wit, on  
the 1st of *January*, 1804, in the county aforesaid, died,  
and having theretofore, to wit, on &c., duly made and pub-  
lished his last will and testament in writing, and appointed  
the plaintiff executrix thereof, to wit, &c. That the said  
*Louisa Bowen Jenkins* is in life, to wit, &c. That after-  
wards and during the continuance of the said term, and  
the interest of the plaintiff as executrix as aforesaid,  
and before the making of the promise and undertaking  
hereinafter in that count mentioned, to wit, on the 1st  
*October*, 1832, in the county aforesaid, divers, to wit,  
9000 chaldrons, and 9000 tons of coal, had been and  
were by the defendant imported by sea in a certain ship  
or vessel, and brought within the limits of the port  
aforesaid, there to be unloaded, that is to say, the said  
chaldrons by measure, and the said tons by weight.

The second count made claim to the same fee and re-  
ward, as the perquisite of an office of meter generally,  
without stating it to be an ancient office from time imme-  
morial. Third count, reasonable fee. Fourth count,  
*quantum meruit*. Fifth count, borough of *Truro* an an-  
cient borough; port of *Truro* an ancient port. That the  
mayor and burgesses of *Truro* were on the 26th *Novem-  
ber*, 1795, and long before, and hitherto have been, used  
and accustomed to receive as of right a certain duty or  
toll (4d. per chaldron), called metage, of and from every  
merchant importing amongst other things coal by sea, and  
bringing the same within the limits of the port aforesaid.  
That the said mayor and burgesses, being so entitled, did  
on that day grant and demise unto the said *Silvanus Jen-  
kins* the said office and place of meter, with all advantages

and profits &c., as before. Title to present plaintiff, as before. Importation of chaldrons of coal by the said defendants to be unloaded within the limits of the port; by reason of which the defendants became liable to pay to the plaintiff the aforesaid duty or toll of 4d. upon every chaldrone so imported; and that the defendants, being so liable, promised to pay the sum of 150L Sixth count—claims for toll of coal imported and unladen within the limits of the port of *Truro*, in which port the plaintiff had kept certain measures for the purpose of measuring the coal of such as were disposed to use them. Seventh count—for tolls, in respect of the defendant's having used the said weights and measures. Eighth count—for toll called metage, for and upon divers coals imported. Ninth count—for weighage, portage, and bushelage. Tenth count—for port duties upon goods and merchandize. Eleventh count—for tolls upon goods, &c. Twelfth count—for petty customs. With counts for work done and materials provided, the money counts, and a count upon an account stated. Plea—the general issue.

The plaintiff in this case claimed, as the representative of a lessee under the corporation of *Truro*, to be entitled to a toll of 4d. per chaldrone, under the name of metage, upon all coal discharged in that port. At the trial before *Williams*, J., at the Spring Assizes for the county of *Cornwall*, the plaintiff gave in evidence the following documents:—An extract from *Doomsday* for the purpose of shewing that *Truro* was at that period in the possession of *William Earl of Morton*, the brother of the Conqueror, and Earl of *Cornwall*. A charter of *Reginald Fitzroy*, Earl of *Cornwall*, son of *Henry 1*, addressed to his subjects “*tam Anglicis quam Cornubiensibus*,” and granting to his free burgesses of *Truro* “*sac et soc*,” *toll*, &c. An *inspeximus* charter of 13 *Edw. 1*, confirming prior grants. A charter of the 31st *Elizabeth*, the governing charter of the borough, reciting that the port of *Truro* was part of the

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port of *Falmouth*, and that the inhabitants of *Trewo* endeavoured by all means to preserve the port, by cleansing and repairing the same, reciting also the enjoyment by them of ancient prescriptions and privileges; and confirming all ancient liberties, privileges, jurisdictions, franchises, granted as well by the Earls of *Cornwall*, lords of the borough, as by the Crown, &c. A lease dated 21st February, 1752, from the corporation of *Trewo* to *Stephen Tippett*, granting and demising, in consideration of the sum of 631*l.*, the office or place of meter of the borough, together with all advantages, profits, emoluments, fees, perquisites, and rewards whatsoever arising or accruing from the measuring of all corn, grain, coal, &c., which should be exported or imported within the limits of the port of the borough, for a term of ninety-nine years. This lease contained a covenant to indemnify the lessee from all charges incurred in defending any action brought against him on account of his demanding or taking any of the usual and accustomed dues belonging to the office of meter. A lease dated the 26th November, 1795, from the corporation of *Trewo* to *Sylvanus Jenkins* (the testator), of the office or place of meter, &c., together with all advantages, &c., for the term of ninety-nine years. This lease also contained a similar covenant, to indemnify the lessee against actions. The dues to be levied were indorsed on the lease, and amongst them were "coals by the chaldron 4*d.*" It was proved, that, from the year 1772, the lessee had been rated to the relief of the poor in respect of the metage, and also to the church rate from the year 1779.

Parol evidence was given of the payment of the dues from the year 1772 down to the period when the claim was disputed, in 1828. The mode of measuring the coals appeared to be as follows:—One person measured for the merchant, and another for the captain, the corporation meter, who was also the officer of the customs, appointed

to collect the duties on coals carried coastwise, standing by and keeping an account. If the officers assisted in measuring, there was an extra payment on that account. Evidence was also given of the receipt of *anchorage* by the corporation; that they cleansed the channel of the river from time to time; and that the bounds of the port were perambulated every seventh year by their officers; that poles had been fixed in the rock to mark the boundaries; and that the letters "T. B." had been sometimes cut on the surface of the rock. It appeared also that the borough coroner had from time to time held inquests in different parts of the port.

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It was admitted that the defendant's wharf was within the limits of the port; that the coal in question had been imported; and that an offer had been made on the part of the plaintiff to measure it, which had been rejected by the defendant.

The learned Judge, in summing up, left it to the jury to say, whether the office of meter was an immemorial office—informing them, that, in order to establish that fact, the plaintiff was bound to satisfy them that it had existed from before the time of legal memory; that, with regard to this question, they might take into consideration the amount of the toll claimed, as shewing whether or not a toll of such an amount would be reasonable at such period; that, with regard to the origin of the claim by grant, he was not aware of any rule of law which precluded the jury from presuming, from the parol evidence only, a grant of the right, and that they might presume such grant from some person entitled to make it, before the time of legal memory, or before the charter of *Elizabeth*. It did not appear that the learned Judge put it to the jury, that the claim might be supported as a port duty, payable in respect of the franchise or ownership of the port, and referable to a modern grant. A verdict having been found for the defendant, the Solicitor General obtained a rule for a new

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trial, on the ground of misdirection, and also on the ground, that, in consequence of the learned Judge omitting to direct the jury with regard to the application of the evidence, the jury had been misled into giving a verdict against the weight of evidence.

*Merewether and Coleridge, Serjts.*, now shewed cause.—This rule was obtained upon two grounds—*first*, upon a supposed misdirection of the learned Judge who tried the cause; and, *secondly*, on the ground that the verdict was against the weight of evidence. With regard to the misdirection, it may be observed, that, although it may be usual to put cases of this nature in a stronger light to the jury, yet it is not a necessary consequence of the case not being so presented, that a new trial shall be granted. What is said by a Judge must be taken with reference to the facts of the case which have been proved: and if, in a case depending upon usage, these facts tend to throw suspicion upon the claim, then the authority of the usage must be put upon a lower scale. [Parke, B.—The case was not put so strongly as other Judges and myself have been in the habit of putting it. The learned Judge told the jury that they might presume a former grant from the evidence of modern usage. I think that he should have told them that they *ought* to presume a grant. If this were not the law, it would be impossible that a great variety of ancient payments could, if questioned, be supported. That a jury is at liberty to make such a presumption is not the form in which such questions are usually left to them. What would become of moduses unless this were the rule?] Where there has been an uninterrupted enjoyment as far back as living memory extends, and the title of the party has never been questioned, and is free from suspicion, it may be very proper that a Judge should instruct the jury that it is their duty to presume every thing in support of the right claimed; but where, as in the

present case, there are circumstances exciting great suspicion ; where the party, possessing the means of proving his title by documentary evidence, withholds that evidence; and where there exist other circumstances which shew that the payments were for a long series of years compulsory or made under mistake—the proof of usage is much weakened, and a jury ought not to be called upon to attach the same credit to it as if it had stood unaffected by those considerations. The direction of the learned Judge was, therefore, with reference to the circumstances of this case, correct: but, even if he did not put the question of presumption in a sufficiently strong point of view, the point being substantially left to the jury, there is no ground for a new trial.

The verdict was not contrary to evidence. The payment in question was claimed by the plaintiff either as *metage*, that is, a fee in respect of the office of meter, or as a port duty. *First*, with regard to the claim of metage. In none of the earlier documents is there any trace of such a claim. In *Doomsday Book* the land does not appear as "*terra regis*," but as held under the Earl of *Morton*; and neither in the charter of *Reginald Earl of Cornwall*, nor in that of *Edward I.* which is a charter of confirmation, is there anything found affecting the matter. The charter of the 31 *Elizabeth*, however, is more material. The recitals in that charter expressly refer to the port, and the various officers of the corporation are enumerated, but amongst these there is no mention made of the officer now called the meter ; from which it may be inferred that there was no office of that description then in existence. [Parke, B.—The answer to that observation would be, that, from time beyond memory, the corporation had possessed the right of appointing a meter. If the meter had been mentioned, it would have been an argument against the presumption. The omission in the charter seems rather to be in favor of the plaintiff's title.] The mayor

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*Exch. of Pleas,* and other officers, who certainly existed before that period,  
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are specifically mentioned in the charter. Another ob-  
servation also arises upon this charter, that it expressly  
gives anchorage, which is a payment in the nature of a  
port due, for every vessel anchoring in the port. Weigh-  
age is also mentioned, but there is nothing to support the  
particular claim in question. From the period of the  
charter of *Elizabeth* down to the year 1752, there is a  
chasm in the title to these payments. The usual doctrine  
of presumption is not fairly applicable to this period, for,  
presumption can only have place in the absence of better  
evidence; and it appeared, by the admission of one of the  
officers of the corporation, that there existed in the  
munition room of that body documents relating to this  
period which had not been produced. The title then is  
taken up again in the year 1752, and a lease is given in  
evidence, from the corporation to a custom-house officer,  
of the office of meter, and of such dues as had been  
formerly and usually paid. It appeared that after this  
lease the dues for metage and the custom-house duties  
on coals were mixed up together, being put upon one  
paper and collected at the same time, and thus continued  
till the duty on coals was taken off, on which occasion  
*Mrs. Jenkins*, the plaintiff, purchased the custom-house  
weights and measures. This mode of collecting the metage  
dues very much weakens the evidence of payment. In  
1795 another lease was granted by the corporation to the  
party under whom the present plaintiff claims. This,  
with evidence of the reception of the dues for about  
seventy years, is all the evidence in support of the plain-  
tiff's title to the metage. Upon the point of the modern  
usage, the case of the *King v. Joliffe* (a) was cited in  
moving for this rule. There *Abbott*, C. J., says, "Upon  
the evidence given, uncontradicted, and unexplained, I

(a) 2 B. & C. 54; 3 D. & R. 240, S. C.

think the learned Judge did right in telling the jury that it was cogent evidence upon which they might find the issue in the affirmative;" and he adds—"A regular usage for twenty years, not explained or contradicted, is that upon which many public and private rights are held, there being nothing in the usage to contravene the public policy." The correctness of these *dicta* may be admitted, but they do not apply to this case, in which the evidence is not of the cogent nature alluded to by the Chief Justice, but is greatly weakened by circumstances of much doubt and suspicion. In the lease of 1752, there is a covenant of indemnity against any one claiming these dues; which is a proof that the enjoyment had not been undisturbed. It is of the very essence of an usage that it should be without doubt or question.

Then it is contended that the plaintiff's claim may be maintained as for a port duty, upon the *indebitatus* count to that effect. But it is clear that this cannot be. In the first place, if there be any payment in the nature of a town due or port duty, the corporation, and not the plaintiff, are the proper parties to sue. How is the plaintiff entitled to any port duty? The lease of 1795 does not convey to the lessee any right to port duties. [Alderson, B.—All that is conveyed to Jenkins by that lease is the metage; your argument is, that the plaintiff is not the proper party to sue.] Certainly: nor can the plaintiff refer to the modern usage to strengthen her title, and rest it upon the presumption of a grant; for, as she and the testator have held under the lease, the perception of the profits must have a reference to the lease also, although they may have been taken under a mistake. But there is another ground of objection to that payment as a port duty. There is no sufficient consideration shown for it. The general rule is, that no charge can be imposed upon the subject without a corresponding benefit.—Thus, a person cannot prescribe

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for toll thorough, without at the same time setting forth a consideration, as that he repairs the highway; for, the public, having a general right of passing through highways, cannot be so charged without receiving a corresponding benefit. *South v. Sheppard* (*a*), *Truman v. Walgham* (*b*). In *Colton v. Smith* (*c*), it was held that a prescription by a lord of the manor for toll of all goods landed within the manor, in consideration of repairing a wharf within the manor, was good. There the toll was held good by reason of the consideration: Lord *Manfield* remarking—"In this case, every body that pays has a benefit." In *Warren v. Prideaux* (*d*), a person prescribed for a toll in consideration of maintaining a quay; and *Hale*, C. J., said: "If he had said that he and all those whose estate he had, had a port and were bound to maintain that port, *that* might have been a sufficient prescription; but, in this case, there must be a specific inducement and compensation to the subject, by reason of those statutes by which all merchants and others have liberty to come in and go out." Now, in the present case, it was not proved that the corporation were bound to make any repairs, or that there was any consideration whatever for the exaction of this payment as a port duty.

The *Solicitor General*, and *Rowe, contra*.—This rule was moved for—*first*, on the ground of a misdirection on the part of the learned Judge; and, *secondly*, not on the ground simply, as stated on the other side, of the jury having given a verdict against the weight of evidence, but on the ground that the Judge, by omitting to direct them with regard to the application of the evidence, had misled the jury into giving a verdict against the weight and proper operation of that evidence.

(*a*) *Moore*, 574.

*Term Rep.* 660.

(*b*) 2 *Wils.* 299. See also *Mayor of Nottingham v. Lambert, Willes, 111*; *Lord Pelham v. Pickeringill*, 1

(*c*) 1 *Cowp.* 47.

(*d*) 1 *Mod.* 105.

First, with regard to the misdirection. In his summing up, the learned Judge omitted sufficiently to instruct the jury with regard to the nature and weight of the evidence necessary to prove a prescription. He ought to have told them that a long continuance of modern usage, unbroken and uncontradicted, was cogent evidence of a prescriptive title: but this he did not do; nor did he distinguish between a claim to the profits of an immemorial office, and a claim to a port due. These, although omissions only, amount to a misdirection. Then there was a positive misdirection with regard to the time of the supposed grant. The learned Judge told the jury that they might, from the evidence before them, presume a grant of the toll, if they thought that such grant was anterior to the charter of *Elizabeth* or the time of legal memory. He never intimated to them that such a grant of port duties might be made at a subsequent period. [Parke, B.—Did you claim the duties distinctly, as under some instrument or lost grant? If you did not, why should the Judge put it as a question to the jury when it had not been raised by you?] The case was opened as a claim for a port duty, upon a title supported by the prescription arising from a possession of very many years. It was certainly not opened as a case of lost grant. The learned Judge ought to have explained to the jury the effect of that evidence of possession upon the claim of the plaintiff. The title of the plaintiff to the payment of 4*d.* a chaldron as a port duty was clearly made out. But it is said, that the plaintiff cannot make title on account of the want of consideration; and that it would be matter of extreme hardship to impose the payment of this toll upon parties whether they weigh their goods or not with the meter, and that the latter should receive payment for duties which he is never called upon to perform. It is not, however, the weighing that forms the consideration for the claim. There

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are other considerations in respect of which the corporation entitle themselves to this and other payments. In the first place, the corporation are owners of the port of *Truro*; for, although a subject cannot create a port, which is a royal franchise, yet the Crown may grant such franchise to a subject; and of these grants many instances are mentioned in Lord *Hale's* treatise *De Portibus Maris* (*a*). Thus, the port of *Topsham* was granted to the Earls of *Devon*, *Kingston-upon-Hull* to the Archbishop of *York*, and *Sutton Pool* to the Dukes of *Cornwall* (*b*). The corporation of *Truro* have exercised all the rights of owners of the port. They have received anchorage from all ships coming to anchor within the port: and this is a payment which, according to Lord *Hale*, is due to the owner of a port (*c*). They have been in the habit of receiving quay dues, they cleanse the harbour, they perambulate the bounds, and they are conservators of the port. These rights they enjoyed before the charter of *Elizabeth*, which in this respect was only in affirmation of them. Then, does the ownership of the port furnish a consideration? Although the Crown can grant the franchise, still another claim arises in respect of the ownership of the soil, and hence it became usual to grant the franchise to the owner of the soil. Then, the very circumstance of permitting the soil to be dedicated to the purposes of a port forms of itself a sufficient consideration for the payment of duties similar to the present. Thus, in the *Mayor of London v. Hunt* (*d*), it was held that the liberty of bringing goods into a port for safety, in itself implies a consideration. Upon the same principle, a prescription for toll of all goods set on land within the plain-

(*a*) *Hargrave's Law Tracts*, cap. vi. p. 72. and *Burgesses of Truro v. Reynolds*, 8 Bing. 275; 1 Moo. & Scott. 273.

(*b*) *Id.* p. 55.

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(*c*) *Id.* p. 74. See the *Mayor*

(*d*) 3 Lev. 37.

tiff's manor was held good, without shewing any consideration. *Crispe v. Belwood* (a).

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But, supposing the mere ownership of the port not to be a sufficient consideration, the corporation have certain burthens imposed upon them, which furnish a consideration sufficient to support their title. They are at the expense of cleansing the port, and they maintain bushels, and weights and scales, for the measurement and weighing of goods. If they are bound to perform these duties, such obligation is a sufficient consideration, although in fact the duties are not performed, since the corporation are liable to be indicted for the neglect. Thus, in *Vin-kensterne v. Ebden* (b), it is said by Lord Chief Justice Holt, that the consideration in cases like these is, that the party has been from time whereof &c. obliged to repair, and not that he has repaired the port. It was not, therefore, necessary to shew that the corporation had ever in fact weighed or measured the goods in respect of which the toll was claimed. In *Haspurit v. Wills* (c), which was a claim of toll for wharfage and cranage, in the city of *Norwich*, it was said, that, if the claim had been for goods landed on the quay, or that the plaintiffs claimed the river, it would have been good. In the case of the *Mayor of London v. Hunt* (d), the action was by the corporation of *London*, for tolls under the name of weighage. It was objected, upon error, that there was no consideration for this toll; but the Court said that the consideration was sufficient, being a liberty to carry goods to a port, which is a place of safety, and imports a consideration of itself, and that the mayor and commonalty of *London* have the view and correction of the river *Thames*, by the statute 10 Edw. 4. In the *Mayor of Yarmouth v. Eaton* (e),

(a) 3 Lev. 424.

(d) 3 Lev. 37.

(b) 1 Ld. Raym. 384.

(e) 3 Burr. 1406.

(c) 1 Mod. 48.

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this subject was again discussed, when the doctrine laid down in the *Mayor of London v. Hunt* was recognized by Lord *Mansfield*. "The making a port," he observes, "is itself a consideration. It is a self-evident convenience to the merchant. It speaks for itself; it may never require repairs, therefore I do not know that it is necessary to shew repairs." In this case Mr. Justice *Wilmot* cited the *Mayor of Exeter v. Trinlet* (not elsewhere reported): observing, that, in a toll thorough, a consideration must be shewn, because it is against common right; but that a port duty does of itself import a consideration to support it. The case of *Warren v. Prideaux* (a), cited on the other side, is in fact an authority to shew that the using of a port is a sufficient consideration for the payment of port dues. The distinction is, where a toll is claimed upon the sea, or upon a navigable river; in which case, a clear consideration must be undoubtedly shewn. Lord *Hale*, in this case, says: "If any man will prescribe for a toll upon the sea, he must allege a good consideration; because, by *Magna Charta*, and other statutes, every man has a liberty to come and go upon the sea without impediment." The case of the *Earl of Falmouth v. George* (b) is an authority in favour of the plaintiff. There the payment was claimed in respect of a capstan, and it was objected that there was no consideration with regard to the boats which did not use the capstan; but *Best*, C.J., said: "Although the fishermen may not always use the capstan, yet it is of advantage to them. The keeping of a capstan for such a purpose is a sufficient consideration for a reasonable toll."

*Metage* is properly claimable as a port duty. Lord *Hale*, in his treatise *De Portibus Maris* (c), enumerates the various payments which are made at different ports

(a) 1 Mod. 105.

Bingh. 286.

(b) 2 Moo. & Payne, 457; 5

(c) Hargrave's Law Tracts, p.76.

under the title of port duties or petty customs, and amongst these he mentions measurage, which he describes as "a toll due for the use of a common bushel, or other instrument, to measure dry or wet goods, imported or exported." The claim of the plaintiff is precisely to a toll of this nature.

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But it has been argued, that, even supposing that the corporation are entitled to the town dues, the present plaintiff cannot recover, there being no conveyance of the port dues, as such, from the corporation to her. She is, however, entitled to sue under the deed of 1795. That instrument conveys the office of meter with "all advantages, profits, emoluments, fees, perquisites, and rewards, arising or accruing from the measuring of all corn," &c. These words are sufficient to pass the right to the claim in question, which is undoubtedly a "fee for measuring." [Parke, B.—Supposing the office of meter to be an ancient office, and that the sum paid for the measuring of coal was an ancient port duty, may not the corporation have annexed that payment to the office of meter? In such case, the lease would carry the right to the duty.]

PARKE, B.—It appears to me, that there ought to be a new trial in this case, on the ground that the claim of the plaintiff may be supported as a port duty in the corporation, through whom she derives her title. Now it appears that the learned Judge did not leave it to the jury, whether or not the plaintiff was entitled to recover as for port duty, although there certainly was evidence to support such a claim. That a port duty may be created within time of memory, there can be no doubt. The King may grant to a subject the franchise of creating a port, and may confer upon the person who thus dedicates his land to the public, and incurs the obligation of repairing the port, a compensation from those who use the port, in the dues paid in respect of the various commodities imported. It

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is well-established law, that it is unnecessary to shew that these payments have been made from time immemorial.

It is difficult to say, after looking at the report of the learned Judge, that there has been a misdirection; though, from the statement of counsel, the mode in which this question was left to the jury is not precisely that in which it has been the practice to leave to them the consideration of such rights. The correct mode of presenting the point to them would have been, that, from uninterrupted modern usage, they should find the immemorial existence of the payment, unless some evidence is given to the contrary. That is the ordinary mode in which such questions are left to a jury; and it is very important that the rule should be observed, not only with respect to claims like the present, but also with regard to various public exemptions, depending upon usage, such as a modus, and similar rights. The learned Judge, however, did not so leave the case to the jury. He told them merely that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not advise them that they ought to make such presumption, unless some evidence to the contrary appeared. It likewise appears that the learned Judge did not call the attention of the jury to the fact that the claim in question might have had its origin within time of memory; and that with a view to this being an immemorial payment he pointed out to them the amount of the sum claimed for the metage of each chaldron of coals. This argument may probably have had a very material influence on the minds of the jury, when considering the claim as one necessarily dependent upon immemorial usage. Upon the correctness of the reasoning drawn from the fact of the value of money, great doubt may be entertained; and the jury might not have come to the same conclusion had they not been

told that the payment was from time immemorial. For these reasons, and principally because the learned Judge did not inform the jury that the claim of the plaintiff might be maintained as a port duty, but confined the case to a question of ancient immemorial usage, I think, without giving any opinion upon the weight of the evidence, that this case ought to go down for the consideration of another jury.

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BOLLAND, B., was of the same opinion.

ALDERSON, B.—I also am of the same opinion. The summing up of the learned Judge appears to me to have had the effect of misleading the jury. It represented the plaintiff's claim to them as being against common right; but that is not the case, inasmuch as every person making the payment in question receives a compensation for such payment. Had it been left to the jury to say whether or not the sum claimed was payable as a port duty, it would not have been considered as a claim against common right. I am also of opinion that too little stress was laid by the learned Judge upon the usage of modern times. If an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, is not sufficient to establish a right like the present, there are innumerable titles which could not be sustained.

Rule absolute without costs.

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### CHARLESWORTH v. RUDGARD.

A local act prohibited the commissioners therein named under a penalty, from acting in the execution of the act, when personally interested. By another clause, if an action was brought against any person "for any act or thing done in execution of, or under the authority of the act," and the plaintiff should be nonsuited, the defendant was to recover treble costs. The defendant, a commissioner, was sued for acting, &c. being personally interested, and the plaintiff was nonsuited:—

*Held*, that the acting as a commissioner, &c. was not "an act or thing done in execution of, or under the authority of the act," and that the defendant was not entitled to treble costs.

THE plaintiff in this case (*a*) having been nonsuited, the Master taxed the defendant his treble costs under the 160th section of the local act. (9 Geo. 4, c. xxvii.)

*M. D. Hill* now moved for a rule to shew cause why the Master should not review his taxation, on the ground that an action for penalties was not within the 160th section of the act. He cited *Smith v. Wallis* (*b*), as precisely in point.

*Adams*, Serjt., shewed cause in the first instance, and contended that the defendant's acting as a commissioner was "an act or thing done in execution of, or under the authority of the act (*c*)."

*Hill*, in reply, cited *Umpheby v. M'Lean* (*d*), and *Willet v. Tiddy* (*e*).

*Cur. adv. vult.*

The judgment of the Court was delivered by—

*PARKE*, B.—In this case a motion was made on *Thursday* last, for the Master to review his taxation, by disallowing to the defendant treble costs, which had been taxed under the 9th Geo. 4, c. xxvii. s. 160. (local act), and cause was shewn in the first instance. We are of opinion that the rule ought to be made absolute.

The action was brought for a penalty, under the 13th section, for acting as a commissioner, being disqualified

(*a*) See the report on the motion for setting aside the nonsuit, ante,

p. 498.

(*b*) 1 T. R. 252.

(*c*) See the clauses of the act, given in the judgment.

(*d*) 1 B. & Ald. 42.

(*e*) 12 Mod. 6.

under the act, that is, for acting in a case wherein he was personally interested in the matter in question. The plaintiff was nonsuited on the last trial, and the question is, whether the defendant was entitled to his treble costs under the 160th section. We think that he was not; and that this section applies, not to actions for penalties for disobeying the statute, but only to cases in which the defendant has done an act for which he would be liable to an action unless he had the protection of the statute, and has acted ~~in~~ so doing either in obedience to it or under the belief (founded on reasonable grounds) that he was so acting; to cases, for example, in which a commissioner might have had an action of trespass brought against him for removing an obstruction in the streets under the 75th section, or a person employed to impound cattle, for taking a man's horse in the street and detaining him until he paid a penalty under the 90th section.

This Court has already determined, when the case was before them on a former occasion, that the 159th section did not apply to this action for a penalty; the section provides, that "no plaintiff shall recover in any action commenced against any person for any thing done or performed in execution of, or under the authority of this act, unless notice thereof in writing shall be previously given to the person or persons intended to be sued twenty-eight days before such action shall be commenced, which notice shall be signed by the said plaintiff or plaintiffs, or his, her, or their attorney or attorneys, and shall clearly and distinctly specify the cause of such action; nor shall such plaintiff or plaintiffs recover in any such action, if tender of sufficient amends shall have been made to him, her, or them."

The ground of the decision was, that the context shewed that the object of the notice was to enable a party to

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*Exch. of Pleas,* tender amends; and, where a penalty was supposed to be  
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We think that we should put the same construction on words which are almost identically the same in the 160th section; and for a similar reason, namely, that the whole provisions of that clause shew that it was intended to confer a benefit on the defendant, which the legislature never could have meant to give to persons acting in violation of the duties imposed on them by the act: and, when we refer to the particular provisions of the section, which the legislature supposes to apply to all such actions as are within the section, we shall find many of them to be inapplicable to actions for penalties. The clause is as follows:—"That no action or suit shall be commenced against any person or persons for any act or thing done in execution of, or under the authority of this act, after three calendar months from the time when the cause of such action shall have arisen or been committed, or have ceased and been determined; and in every such action or suit the venue shall be laid, and the cause tried, in the city, county, or place where the cause of action shall have arisen or been committed, and not elsewhere: and the defendant or defendants in every such action or suit shall and may, at his or their election, plead specially, or the general issue and give this act and the special matter in evidence, at any such trial, and that such cause of action arose or was committed in pursuance or under the authority of this act; and if the same shall so appear upon the said trial, or if such action or suit shall have been commenced before such notice shall have been given as aforesaid, or before the expiration of twenty-eight days from the service thereof, or after sufficient amends and satisfaction made or tendered as aforesaid, or after the time limited for commencing the same, or shall be commenced in any other city, county, or place than as aforesaid, then

and in any of the said cases, the jury shall find a verdict for the defendant or defendants; and upon such verdict, or, if the plaintiff or plaintiffs upon the said trial shall be nonsuited, or shall discontinue his, her, or their action or suit after the defendant or defendants shall have entered an appearance thereto, or if upon any demurrer judgment shall be given against the said plaintiff or plaintiffs, then and in every such case the defendant or defendants shall recover treble costs, and have such remedies for recovering the same as any other defendant or defendants hath or have in other cases by law."

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All these enactments are clearly meant to be advantageous to the defendant; and the provision that the defendant may plead the general issue and give the act and special matter in evidence, and that the cause of such action arose or was committed in pursuance of the act, is clearly inapplicable to an action for a penalty. So, the enactment, that, if it shall appear upon the trial that no notice was given; for, notice is not necessary in such an action; and so also that a sufficient tender of amends was proved.

For these reasons, we are of opinion that the clause in question does not apply to the present case.

I should observe that a similar question appears to have arisen in a case reported in *Viner's Abridgment* (a), in an action for a penalty against a commissioner of the land-tax, where the point was not decided, as the Court set aside the execution for double costs, on the ground that the defendant had in the first instance received single costs. This case cannot be considered as an authority either way. On the other hand, in the case of *Wright v. Horrocks* (b), which was an action against the defendant on the 18 Geo. 2, c. 20, to recover a penalty for acting as a justice of the peace, not being duly qualified, *Wood, B.*, ruled that the defendant was not within the 24 Geo. 2,

(a) *Tit. Costs*, I, pl. 18. (b) *Holt, N. P. C.* 458.

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c. 44, which enacts that notice of actions brought for any thing done execution of his office; but his de different ground from that upon present case.

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A declaration stated a promise to the plaintiff and *A. B.* now deceased in his lifetime, and in a second count stated that the defendant was indebted to the plaintiff and the said *A. B.* in his lifetime, but did not aver that he was deceased. The defendant having demurred to the second count:—  
*Held*, that the demurrer was frivolous within the 2nd Rule, *H. T. 4 W. 4.*

**ASSUMPSIT** on a bill of exchange. The first count stated, that the defendant in the lifetime of one *W. Harvey*, certain bill of exchange, &c.; and the plaintiff and to *Harvey*. The was in *indebitatus assumpsit*, for it was stated, commenced thus:—"And at the time of the said *W. Harvey*," and that the defendant was indebted to *Harvey*, and promised the plaintiff and but did not aver that he was now dead. The defendant pleaded a special plea to the demurrer to the second, on the appear in or by that count that therefore that he ought to have b

*Crompton* obtained a rule to set to be at liberty to sign judgment on the ground that the demurrer was frivolous, within the meaning of the rule. The rule was drawn up on reading the demurrer, and marginal statement

(a) It is necessary to bring the matter before the Court, either on affidavit stating the pleadings, &c. or to draw up the rule on reading

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*Channel* shewed cause, on affidavits stating that the cause had been before two of the learned Barons at chambers; and he contended, that, as they did not interfere, the case ought to have been set down for argument in the regular way.

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It seemed doubtful, however, whether the case could have been argued in the term; and the Court expressing a clear opinion that the matter stated in the demurrer and margin was frivolous, *Channel*, on an affidavit of merits, obtained leave to amend, upon payment of the costs of the demurrer and of the application.

Rule accordingly.

ground that the affidavits were not sufficient. The objection to them was, that, instead of saying, this deponent *said*, the form used was, this deponent *said*; and the

Court thinking this insufficient, and the rule not being drawn up on reading the declaration, discharged the rule.

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The Rev. GILBERT BERESFORD, Clerk, *v.* WILLIAM NEWTON, OLIVER ANDERDON, THOMAS SLAUGHTER, JAMES PERRY, GEORGE LAIGHT, and JAMES HILLMAN (*a*).

THIS was a bill filed by the plaintiff, the rector of the parish of *St. Andrew, Holborn*, in order to enforce certain

sums in lieu of tithes, it was proved that the respective occupiers of certain houses, either ancient or built upon ancient sites, and situate in that part of the parish of *St. Andrew, Holborn*, which is without the city of *London*, had for the last hundred years uniformly paid certain specified and invariable sums in respect of each house: but such payments were never made by the owners or occupiers of houses built upon new sites. The payments varied in amount on different houses, and were not in any distinct rate or proportion to the value of the houses *inter se*, and were not general through this part of the parish:—*Held*, first, that the Court were warranted in inferring from these facts, that the payments had been made from time immemorial; secondly, that they could assign a legal origin for such payments, and that they could legally be enforced by the rector of the parish.

(*a*) For a report of the proceedings on the equity side of the

Court, see the second volume of Younge's Reports.

*Exch. of Pleas,* ancient customary payments alleged  
 1835. such rector in respect of certain ho  
 BERESFORD several defendants, and situate in t  
 v. of St. Andrew, Holborn, which is  
 NEWTON. Middlesex (a).

The case was argued before Alder Hall, at the sittings after last 7 Boteler, Mr. Beames, and Mr. Jamby Sir Charles Wetherell, Mr. Swdon, and Mr. Younge for the defend time to consider; and afterwards, desired that the opinion of the

(a) The bill, after stating the plaintiff's induction into the rectory of St. Andrew's, Holborn, and that as such rector he was entitled to recover all tithes, dues, rates, customary payments, duties, or sums of money in lieu of tithes and profits belonging to the rector; that the parish was an ancient parish, partly situated in the county of Middlesex and partly in the city of London—alleged that part of the profits or dues which the rector for the time being was, and by custom and usage from time immemorial had been, entitled to receive and take, arose from *ancient customary payments* made by the tenants or occupiers of houses within the parish, in lieu of tithes; the greater portion of which payments, being sums certain, were made for and in respect of each house by the tenant or occupier thereof; and all which payments were due to the rector for the time being, and were called and were in lieu of tithes, and as such had been from time to

taken on the following case previously to the final decree being pronounced in the cause.

"The plaintiff was admitted to be the rector of the whole parish of *St. Andrew, Holborn*, which is partly in the city of *London* and partly in the county of *Middlesex*. The defendants were admitted to be respectively occupiers of certain houses situate in that part of the parish which is within the county of *Middlesex*. There was no distinct evidence shewing when the sites of the particular houses which are now occupied by the defendant were first built upon; as far back as living memory went, and by documentary evidence as far back as for one hundred years last past and upwards, the successive occupiers of these particular houses have uniformly paid to the rector for the time being of this parish certain specified and invariable sums in respect of each house. These sums were not paid for *Easter* dues; a distinct and separate account for *Easter* dues having been uniformly kept in the ancient rectors' books, which were produced in evidence. The sums paid by each respective house were different, and did not appear to bear any distinct rate or proportion to the values of the particular houses *inter se*. It was proved that these payments were by no means general through this part of the parish, and that no houses newly erected on new sites ever paid any thing to the rector. The amount paid, if taken with reference to the value of the land on which these houses stand, would plainly be excessive, if taken as a modus for such land, as land in the reign of *Richard the First*.

"The first question for the opinion of the Court was whether, from or under the above circumstances, the Court ought to infer that there were from time immemorial customary payments made by the respective occupiers there in respect of these particular houses, or from houses built on the same sites existing from time immemorial: and, if so, whether such payments could have had a

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legal origin, and can still be legally enforced by the plaintiff, as rector of the parish.

"The second question is, whether, in case such payments have not existed from time immemorial, but are ancient customary payments, they can still be legally enforced by the plaintiff, as rector of the parish."

The case was now argued by—

*Boteler* for the plaintiff.—If the plaintiff can succeed in shewing that claims of this kind have been made, particularly in *London* and the neighbourhood, as legal claims, and that payment of the sums claimed has been enforced by decree, he will be entitled to the judgment of the Court. The cases in which it has been decided that payments like those claimed in the present instance can be enforced are numerous. Thus, in *Umsfreville v. Hedges* (*a*), where the claim was for the payment of 18*s.* for a house out of the city of *London*, and the jury found that there was a *modus* of 18*s.* a year payable for the tithes of a house situate in that part of the parish of *St. Botolph without Aldgate* which lay in the county of *Middlesex*, to be paid by 4*s. 6d.* a quarter, the Court decreed in favour of the claim. That is an instance of as large a payment as any one claimed in this case; and that, it is to be remarked, was found by the jury by the term "modus." So, in *Umsfreville v. Topping* (*b*), the payment claimed for tithes, or customary payments in lieu thereof, for *Hooker's Rents*, in that part of *St. Botolph* which lay in the county of *Middlesex*, was as large as 20*l.* a year; and, in *Umsfreville v. Campion* (*c*), a *modus* of 5*l.* a quarter was decreed to be payable for *Hooker's Rents*. In *Kynaston v. Hattersley* (*d*), the Court decreed the payment of the sum of 20*s.* a year in lieu of tithes, for a house in *East Smith-*

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|--------------------------------------------------|-----------------------------------------------|
| ( <i>a</i> ) 1 Wood, 253; 1 Eagle & Y.<br>553.   | ( <i>c</i> ) 1 Wood, 329; 1 Eag. & Y.<br>590. |
| ( <i>b</i> ) 3 Wood, 12, n.; 2 Eag. & Y.<br>184. | ( <i>d</i> ) 3 Wood, 9; 2 Eag. & Y. 183.      |

*field*, in that part of the parish of *St. Botolph without Aldgate* which lay in the county of *Middlesex*. The evidence there given was similar to the evidence adduced in the present case. In *Kynaston v. Hawley* (*a*), it was decreed that the *Catherine Wheel Brewhouse*, in *Lower East Smithfield*, within that part of the parish of *St. Botolph without Aldgate* which lay in the county of *Middlesex*, paid *3l.* a year to the impropriator of that parish, as a prescriptive payment in lieu of tithes of the said premises. [Lord *Abinger*, C. B.—In that case, does any thing appear to shew the date of the building of the brewhouse?] Nothing appears to shew the date of its erection. [*Alderson*, B.—In that case, the defence was, that the brewhouse was built on lands of the dissolved monastery of *St. Mary of Grays*, near the *Tower of London*, which was dissolved by the *31 Hen. 8.*] These cases are cited to shew immemorial payments in lieu of tithes for houses; and that the amount of *20s.* a year, and even larger sums, have not been considered material, or to affect the legality of those payments. The cases above cited, it may be said, were all questions arising in the parish of *St. Botolph, Aldgate*; but there have been similar decrees in other parishes round *London*. As, for instance, in the parish of *St. Mary Magdalen, Bermonsey*. The first case in that parish appears to have been that of *Whittaker v. Rosewell and Strong*, which is not reported (*b*), but the decree was made *13th November, 1657*; by which decree *Rosewell* was decreed to pay *26s.* a year for a house, and *Strong*, the other defendant, to pay *20s.*; that is, different sums for their respective houses, without reference to the value. In that case, there was no immemorial usage stated. The next case was that of *Lane v. Allen and Another*, which took place in *1659* (*c*). There the payment is claimed by

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(*a*) *3 Wood*, 135. (*b*) See Decree Book. (*c*) See Decree Book.

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usage time out of mind. [*Parke, B.* to be, for and in lieu of tithes?] It same parish is that of *Heath v. San* which occurred in 1733. There the *ford and Thomas* should respective *Bermondsey*, 5s. a year in lieu of they occupied at *Dockhead*. In ments have been decreed to be paya houses, without reference to the re houses. It can also be shewn, tha have prevailed in the parishes of *S St. Olave, and St. Dunstan's*. [Lc The doubt seems to turn on the pri cases proceeded. The Court would principle upon which those decisions They have proceeded on the ground immemorial payments, or of their very long period of time. Then the cases, of which *Dr. Grant's case (b)* many payments of so much in the po houses have been enforced. There this court two years ago, respecting so which was heard before Lord *Lynd* who directed an issue, at the same opinion that the plaintiff had made which the defendant afterwards sub payments upon the terms of each p costs. In the face of so many cases i decided that these payments were v claimed have been decreed to be paid now adjudge them to be illegal. [Lor Might not a party contemplating the on a building lease enter into a cor rector that a larger proportion of tithe

upon one of the houses to exonerate the rest?] It is not impossible that there may have been in ancient times cases in towns and cities, where payments similar to the present may have been agreed to be made, either by way of composition for the personal tithes, which would otherwise have been payable, or as a provision for the parson who would have been without support in parishes where houses were not titheable. [Alderson, B.—In cases where it has been decided that tithes are not payable for houses, except there be a “ custom,” what is the meaning of the word custom? If it means that there is a local charge applicable to each particular house, the term “ custom” is not properly used; for, that would be a prescription.] The term is used in a sense known to the ecclesiastical law, as is clear from the Statute of Tithes, 2 & 3 Edw. 6, c. 13, where the first section directs that tithes are to be paid “ in such manner and form as has been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid.” The term “ custom” is not there confined to its common law meaning of a local usage. The decisions shew that these payments are legal, and therefore the Court will enforce them.

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Sir C. Wetherell, contra.—These payments are not claimed for a house and soil, as for the tithe of land, but in respect of the occupation of houses only. There is no allegation that there was a large sum levied on certain land, and then subdivided amongst the occupiers of houses on the different sites built upon, but a loose allegation of an usage and custom for the payment of these sums in lieu of tithes. These payments are supposed to be supported by the payments of 2s. 9d. in the pound, payable on the rent of houses in the city of London, but there is no analogy between them. Those payments had their origin in the times of Catholic ascendancy, and were paid to the

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clergy in lieu of *Easter* offerings and other ecclesiastical dues, for duties performed by them on *Sundays* and holy days. They were not payments in respect of a modus, a custom, or any usage known to the law. They were confined to the city of *London*, and cannot be applicable to any place out of it. Neither, as far as this part of the parish is concerned, can it be affected by the vicinage of the city. It is not intended to be said that tithe for a house may under no circumstances exist and be payable; but that the modus in question, if considered with reference to all the circumstances of the case, cannot be supported. There may be undoubtedly cases where what is called a tithe for houses (though that is an inaccurate expression) may be valid, as there may be circumstances under which a piece of land covered with a house may be subject to tithe; there may have been a composition shewn to have existed in the time of *Richard* the First, or something analogous to a farm modus; as, where a man agrees that a house with a piece of land attached to it shall pay a certain sum. In such a case, the tithe is in truth paid for the land: *Travis v. Oxton* (a). But in this case there is nothing to shew a custom to pay tithe for land with houses upon it. This is not like a district or contributary modus. The payments here claimed are insulated substantive payments for each house, without reference to the value of the other houses in the parish, and do not go to make up any specific sum laid upon the whole district. Besides, there are other circumstances important to be observed; as, for instance, that they are not general over the parish: houses built on new sites do not pay them; neither are they computed according to any particular rate or amount of value. So that there is nothing to shew that a large sum has been divided among the houses in the district; and no method can be imagined according to which the

division took place. Again, these payments cannot be treated as personal tithes; for, they require an annual renewal, which cannot exist in houses. Neither can personal tithe be annexed to a house. But it is suggested that this may be the result of some agreement between the patron, parson, and landowner, who may have assented to this charge being made on particular lands. But, first, it is not probable that the latter would charge his land with a payment for what might never become due, or might not continue due, which would be the case should the house be destroyed. Secondly, this is stated to be a payment made by the occupier, and not a rent charged on the premises; hence, it is illegal and invalid as a substitution, because it is uncertain both in regard to the payment and the duration (*a*). For, suppose the houses to be burnt down, or the houses cease to be occupied, the sums payable could not be recovered. Can, then, such a customary payment have a reasonable origin when the titheable matter may be destroyed by the act of the occupier, and nothing can be claimed by the rector?

To support these payments, it is requisite that it should be shewn that there was some titheable matter for which the sums substituted ought to be rendered. Besides, these payments are illegal on the ground of rankness. [*Alderson* B.—Undoubtedly, if they are to be treated as payments for a modus in lieu of the tithe of land, they are so.]

*Boteler* in reply.—The cases cited, it is submitted, are clear authorities in support of the plaintiff's claim, and were not cases relating to houses in the city of *London*, but in parts of parishes without the city. Instances of payments of this kind existing are not confined to the

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(*a*) See *Bennett v. Read*, 3 Eagle & Younge, 1338.

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different parts of the kingdom.

Lord ABINGER, C. B.—The first question presented to us in this case is, whether or not there be, under the circumstances, ground for the Court to infer that there were from time immemorial customary payments made by the respective occupiers of these houses. Upon that, I, for one, cannot doubt in this case that there is sufficient to warrant us in forming that inference. It appears by the evidence that for above 100 years the occupiers of these houses have made these customary payments; and it would be a question to be presented to a jury to say, and I should think a jury would ill discharge their function if they did not from such usage of 100 years (not explained or contradicted by any other facts in the case), draw the inference that the usage was immemorial. Therefore that answers the first part of the case.

The second question submitted to us is, “whether such payments could have had a legal origin.” I own I cannot help thinking that we should be doing a great violence to so many decisions which have established these payments, if we were now to declare that all those decisions were to be overturned because we could not find a legal origin for such payments. Surely, it must be agreed that it is the duty of Courts of justice rather to endeavour to find out a legal origin and foundation to sustain a great series of former decisions, than to endeavour to discover some new light for the purpose of setting them aside, and overturning them. I should be disposed to say, that, after a repeated series of decisions upon the particular subject matter before us, by tribunals competent to decide, and standing unimpeached for many years, with an usage grounded upon them, it would be hardly necessary for Courts of justice now to assign some legal ground for the origin of the payments which have been

supported by those decisions. The decisions themselves are sufficient grounds for the Court to act upon; but, however, if called upon to suggest a legal origin for these payments, I think we may resort to any possible suggestion that can be correctly imagined for the purpose of giving a legal origin to them. Now, I think there are several ways in which that legal origin may have arisen. First, I find that by the statute of 27 *Henry 8*, c. 20, there is a general clause, that all tithes should be paid according to the ecclesiastical laws and ordinances of the church of *England*, and after the laudable usages and customs of the parish or place where the party dwelt. Then came the statute of the 2 & 3 *Edward* the Sixth, c. 13, which introduced several variations and several very useful modifications in the law of tithes; among others, it is provided by s. 7, "that every person exercising merchandizes, bargaining and selling clothing, handicraft, or other art or faculty, being such kind of persons and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay (other than such as have been common day labourers), shall yearly, at or before the feast of *Easter*, pay for his personal tithes, &c."—The expression "have accustomably been used to pay," is applicable to all cases where personal tithes had been paid. The 11th section sanctions the payment of the customary tithe of fish, and speaks of the parish. The 12th section speaks of the payment by the inhabitants of the cities of *London* and *Canterbury*, and the suburbs of the same—"Provided always, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend in anywise to the inhabitants of the cities of *London* and *Canterbury*, and the suburbs of the same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act." Now, suppose an agree-

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ment had been made, that certain houses in the suburbs of the city of *London*, namely, in the parish here spoken of, *St. Andrew's, Holborn*, should pay certain specific sums for their tithes, and that all the other inhabitants in these suburbs in that part of the parish should be discharged; if that had been acted on for forty years, does not this statute attach to that agreement? Put the case, first, that it had no legal origin. Suppose it had been acted on for 40, 50, or 100 years; suppose, as we are at liberty do, that the whole of the suburbs of this part lying out of the city of *London* had been in the hands of one or two proprietors, and that they had made a bargain with the rector or proper authorities for the time being, that, upon consideration of certain houses, then built or about to be built within the parish, paying certain specific sums, much larger, we will suppose, than they would probably pay upon any footing of a tithe applicable to these houses, or for the lands the site of these houses, that then any other inhabitants who might come to reside there afterwards, as the population might increase, should be exempted from personal tithes (not exempt from predial tithes, as long as the land should be cultivated, but from personal tithes); then see what would follow. If that bargain had been made and acted upon for forty years, would not the result be that this statute would apply to it, and that the occupiers of those houses would have the benefit of the exemption from all personal tithes within that district, which had been before accustomed to pay personal tithes, by reason of the owners of the houses then existing having submitted to a much larger payment than those houses would otherwise be liable to pay? I think we need not look to the origin of the transaction, if in point of fact it might have existed forty years before the passing of this statute. If it had existed so long, then the statute does this:

it says you shall not pay personal tithes if you have not paid them for the last forty years; but if you have been accustomed to pay personal tithes, you shall continue to do so. I quite agree that a house, *quæd* house, is not liable to pay tithes at all: but I should go further. It does not appear to me impossible to suggest a case where such a composition would be perfectly good. Let me suppose the case of an owner of land which he intends to dedicate to building purposes, and he for that land pays *prædial* tithes. When it is covered with buildings, no tithes are paid for it, because houses, *quæd* houses, pay no tithes; but during the progress of the building, the part not covered with buildings is liable to pay tithes for such matters as it produces. Is there any thing unreasonable in the owner of that land saying to the rector, patron, and ordinary, "I am now going to dedicate my lands to purposes which eventually, very likely, will destroy all your tithes; but I am quite willing to enter into this arrangement with you:—if you will take for the first eight or ten houses that I build, one certain specific payment according to the annual value of the houses—a fixed payment according to the different values of the houses—and exonerate the remainder of the land from tithes, so long as it remains unbuilt on, those payments shall be made to you perpetually as long as those houses are occupied?" Now Sir Charles *Wetherell* asks (and very ingeniously), when the houses have ceased to be occupied, what becomes of the modus? where is the consideration for it? Why, the answer to that is this—that, when all the rest of the land is built on, *ex hypothesi* the rector would be entitled to no tithes at all for the land afterwards built upon, and therefore the owner of the freehold would not make a bad bargain. The rector consented to take the chance of payment upon those houses while they were occupied, in lieu of all the tithes

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claimed, and as a perpetual payment for the tithes which he could not afterwards claim. If the houses were all burnt, then the foundation of the argument is gone; if the land goes back into a state of cultivation, the original right to personal tithes or small tithes is revived. So long as the land is covered by the buildings, so that the rector can get no tithes from the land so covered with buildings, he has made a very good bargain; and that is the origin, as I suggested, that he should have, as long as certain houses were occupied, a specific payment for those houses in exoneration of all the rest. I consider that to be a good modus. Supposing I prove the fact to have existed in proper time, and that it might have been made by competent authorities, I do not see any objection to it in point of law. I do not say such was the fact; I am only suggesting the possible case which my imagination furnishes me with, having regard to this sort of payment. If any case can be suggested, the Court is bound to adopt it, for the purpose of supporting payments that have been allowed above 100 years, and sanctioned by so many decisions of Courts of justice, and by this Court especially 100 years ago. I remember hearing Lord *Kenyon* say, in a very emphatic manner, on a question I had the honour of arguing before him, when I talked of a usage of sixty or seventy years, and the question was as to what was the origin of it, he said, "I will presume an act of Parliament to sanction the usage of 100 years;" that was a strong presumption; however, it shews the emphatic opinion of that Judge as to how far he would go to sanction the existing usage; and when I consider that rights of property must depend on usage, and consider that we are asked to disturb settled and existing rights which have lasted for centuries, I think it is not too much to resort to any possible suggestion that can be adopted for the purpose of supporting them. It appears to me in this case,

that I have suggested two methods very likely to occur to sanction the usage; others might occur, that might equally sanction it; and I think, therefore, we may presume a legal origin to this modus. Whether it is called a composition for tithes, or a modus for tithes, or what you please, it is an ancient payment from time immemorial; and I think there is enough to give us the right to presume that it is applicable to these particular houses. I think, therefore, that we ought to sustain these payments.

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**PARKE, B.**—I am entirely of the same opinion. The first question which is proposed for the consideration of the Court by the learned Judge, is, whether, under the circumstances stated in the case, the Court ought to infer that these were customary payments made by the respective occupiers of houses, in respect of these particular houses, or of houses built on the same sites, existing from time immemorial. These payments appear to have been made as far back as living memory goes, and the houses appear to have existed, from the documentary evidence, for a period of 100 years: from these facts I think it is the bounden duty of the Court to infer every thing necessary to give a legal origin to such payments, unless there is something in the case that convinces us that circumstances did not occur which would give it a legal origin; and if it be necessary in this case to infer the immemorability of the existence of the houses, and the existence of the payments, I think it is the duty of the Court to do so; and it is on that foundation, that immemorial rights and immemorial exemptions are supported in all cases which are tried by juries. Therefore, I have no doubt at all in answering the first question.

With respect to the second question, I certainly had some little doubt in the progress of the inquiry whether

*Exch. of Pleas,* we could attribute a legal origin to the payment. We  
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certainly are bound to do so if we can, because a great  
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variety of decisions from different Courts have been cited, in which those payments have been established and decrees made for them, not merely in respect of payments extending through the whole district, but payments made by the inhabitants of particular houses. Now it appears to me that a reasonable and legal origin can be assigned for those payments. It occurred to me in the course of the inquiry, without adverting to what was said by Lord *Abinger* as to the construction of the statutes of *Henry* the Eighth and *Edward* the Sixth, that a legal origin might be presumed in this way—that you might presume an agreement before the time of legal memory between the parson, patron, and ordinary on the one side, and the inhabitants on the other (who at that time were bound to pay personal tithes), that ever after they should be exempt from the payment of personal tithes, on condition that the tenants of certain then existing houses and all subsequent tenants of those houses should pay a certain pecuniary composition in respect of each house; that would have been a perfectly good modus. I was not aware at that time that it was contended that the inhabitants and occupiers of sites of houses, not being at that time occupied as dwelling houses, were exempt from the payment of this legal modus or prescriptive payment; but, if they were, that certainly shews that that supposition of mine could not be supported: because, in order to sustain that particular modus, it would be necessary to assign to the incumbent of the parish some permanent payment in lieu of the tithes which he was entitled to by custom from all the existing inhabitants; but it would not have been a permanent payment if they had only paid during the occupation. There is however another supposition of a similar nature which it appears to me would be perfectly good.

Supposing there was immemorially, before time of legal memory, a composition entered into between the patron, and parson, and ordinary, and the inhabitants of certain particular houses, that the inhabitants of those particular houses should be exempt from the payment of all personal tithes, they paying so much per house in lieu of those personal tithes; that would be a good modus, as they would only be bound to pay as long as they were tenants of the houses, and the modus would be a satisfaction of the personal tithes. Then, why are we not at liberty to make such a supposition in the present case? First, it is said that it ought to be shewn that the rest of the inhabitants had paid personal tithes; the answer to that objection, I should say, would be that the obligation of the inhabitants originally existing in custom, might have been lost by desuetude; and it is no answer to my supposition, that in modern times the rest of the inhabitants do not pay personal tithes, or any composition for personal tithes. But there is another answer, which also occurs to me, to that objection, which arises from the statutes. If you suppose a composition was made for each individual house before time of legal memory, and to continue to be paid down to the time of *Edward the Sixth*, (and down to that time the inhabitants at large were in the habit of paying personal tithes,) that statute would continue the composition with respect to the houses, but put an end entirely to all obligations on the inhabitants of *London* to pay personal tithes; and therefore the effect of that statute would explain the reason why in modern times no personal tithes were paid for such district. And this composition or payment of ancient houses from time immemorial would be continued in *London* and the suburbs of *London*: the statute would continue the ancient composition, but would put an end to the liability of the rest of the inhabitants to pay any personal tithes; because there is a general clause in the statute which does

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1835.

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so. That supposition appears to me consistent with law; and I am not to suppose that any such engagement was entered into made: it is enough for me to say, that the origin for that practice, which has been in use for a period of time, and which is established by so many decrees. For these reasons, therefore, I think that the answer we ought to give to your learned Judge should be in the affirmative; that he can assign a legal origin for the payment, and that he can subject the suit to the jurisdiction of the court. With regard to the question whether, in case such payments have been made from time immemorial, but are ancient debts, they can still be lawfully enforced—I do not give any answer; for that is only a question of opinion that we could not determine. It appears to me, however, that there is no necessity, therefore, to argue this point.

**BOLLAND**, B.— I am entirely of the opinion that it is the duty of the Court to consider that it is the duty of the Court to determine the length of time during which these payments were made, to entertain any supposition which would in point of law support these payments, particularly in a case of this sort, where we have to determine upon which the claim made may be founded, of those decrees which Mr. Boteler has mentioned precisely of the same order as the question before the Court, as to the time these payments were made, proof given by persons who recollect having paid, and by documentary proof for or against the payment for a great number of years. Therefore, in my opinion, every authority, every supposition ought to be considered in determining these payments legal or illegal. It is impossible that any arrangement should have been made which could cover payments of this sort.

improbable it might be, if it were possible to suppose any case in which they might legally have had an origin, we are of course bound to look at that, even if there was only one possible case. The Lord Chief Baron has pointed out two, and my brother *Parke* has pointed out another. Therefore it is quite unnecessary to suggest that there may be other cases in which that payment might have been made; and upon these grounds I think we can answer in the affirmative the first question which has been put by the learned Judge, namely, that a legal origin may be presumed for this payment.

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**ALDERSON, B.**—I entirely concur with the rest of the Court; but, as I shall ultimately have to give my decision upon this matter, it will be quite time enough then to give my reasons.

#### CREASE v. BARRETT.

**THIS** was an action on the case.—The *first* count in the declaration was trover for tin and tin ore. The *second* stated, that, before and at the time of the making of the indenture thereinafter mentioned, his late Majesty, King *George* the Fourth, then his Royal Highness *George Augustus Fre-*

An entry by a deceased person charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were

Ancient answers of conventional tenants of a manor, stating the rights of the lord of the manor, are admissible in evidence even against the freeholders of the manor; but, if they state facts only, e. g. that "the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 3*s. 4d.*, as by the records thereof remaining with the auditor of the duchy appeareth; unto which, for the more certainty, we refer ourselves"—they are not admissible in evidence.

Declarations of a deceased lord of a manor, as to the extent of his rights over the wastes of a manor, are not admissible in evidence; *aliter*, if spoken of the extent of the wastes only.

Reputation is admissible in evidence, though unsupported by usage.

A lease of tin mines and toll tin was surrendered in 1810, and another lease taken, on payment of a fine, part of which was a compensation for the surrender of a former lease. A statement in a lease of the surface, made by the same lessor, during the existence of the former lease, is admissible in evidence against the lessee in that second lease of the mines and toll.

Where evidence has been improperly rejected, the Court will grant a new trial, unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence.

*Exch. of Pleas, derick, was Duke of Cornwall, and as such was seised in fee, in right of his dukedom, of and in all manner of tin in under and belonging to the manor of Tewington, in the county of Cornwall, the said manor being one of the ancient duchy assessmentable manors; that, within that manor there is an ancient immemorial custom, viz. "that any tinner may bound any wastrel lands within the said manor that are unbounded or void of lawful bounds, and also any several and inclosed land within the said manor that hath been anciently bounded and assured for wastrel by delivering of toll tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the Prince's several and inclosed customary land within the said manor as hath been anciently bounded with turfs, according to the ancient custom and usage within the said manor, by the said tinner marking out by bounds a certain part of such land within or under which he was desirous of working for tin; and that, after such marking out, the said tinner forthwith gave due notice thereof at the proper stannary court for the said manor; and that if, after due proclamation thereof at the said court, the owner of the said tin mines within the said manor did not work for tin within or under the said land so marked out by bounds, it thereupon became and was lawful for the said tinner to work for tin within or under the said bounds, paying and rendering therefore to the owner of the said mines a certain dish or part, to wit, one tenth dish or part of the tin that might from time to time be worked, raised, or procured by the said tinner within or under the said bounds, (the said tinner keeping the residue thereof), as and for a toll, for the privilege of working, raising, and procuring the same;"—that, on the 1st August, 1815, his Royal Highness, by indenture, demised to Edward Smith all the toll and farm of tin or tin ore which should be gained, arise, or be due in any place or places whatsoever within Tewington, amongst*

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other manors, and also all the tin mines found or to be found within the several inclosed lands of those manors, to hold for a term of years depending on lives. The plaintiff then deduced title under that lease, and alleged as a breach, that the defendant, claiming to work under and by virtue of the said custom a certain tin mine within the said manor, worked, raised, and got therefrom large quantities of tin, tin ore, and tin stuff; and that, although it was the duty of the defendant to pay the toll above mentioned, yet he neglected &c., and wrongfully converted the whole of the tin, tin ore, and tin stuff to his own use. There were several other counts, varying from this in matters immaterial to the present purpose, excepting that in some the toll was laid to be one fifteenth. Plea-General issue.

The cause was tried before Lord *Lyndhurst*, C. B. and a special jury, at *Westminster*, at the sittings after last *Trinity* Term. The plaintiff by this action claimed the toll of tin raised from a vein or mine under a place called *Buckler's Bounds*, within a piece of ground called *Boscundle Common*, in the manor of *Tewington*, in the county of *Cornwall*. He claimed under the lease from the Duke of *Cornwall* mentioned in the second count, and contended, that *Boscundle Common* was parcel of the waste of the manor, and that therefore the mines within it belonged to the Duke, who had been lord of the manor, until it was sold under the Land Tax Redemption Act, 38 Geo. 3, c. 60, s. 56, &c. with a reservation of the mines. *Tewington* is one of the seventeen ancient assessionable manors of the duchy of *Cornwall*, and the nature of the tenures in it was settled in *Rowe v. Brenton* (a). *Boscundle Common* contains about 122 statute acres. On the east, it adjoins a piece of anciently inclosed land, called also *Boscundle*, or *Boscundle* estate, of about 101 statute acres; on

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the other three sides, it adjoins the admitted waste of the manor. The defendant was one of several adventurers who were working the mines of that district. They took the mine in question from the Rev. Mr. *Carlyon*, Sir *J. C. Rashleigh*, and Mr. *Tremayne*, as being the owners of the mine. The defendant's case was, that *Boscundle Common* and estate together composed one free tenement, and therefore that the common was parcel of the waste of that free tenement, and not of the manor; that the whole surface of that tenement was now the sole property of Mr. *Carlyon*, but that the persons under whom Sir *J. C. Rashleigh* and Mr. *Tremayne* claimed, having formerly been part proprietors of it, and having reserved the mines within its commons and wastes, the actual property in the mine in question was now vested in Mr. *Carlyon*, Sir *J. C. Rashleigh*, and Mr. *Tremayne*. The plaintiff also claimed one tenth of the toll in *Tewington* instead of one fifteenth, which was admitted to be the usual toll in the Stannaries, and was the only toll that within the recollection of the witnesses had been received in *Tewington*. The usage as to entering lands and paying toll is contained in the presentment of a parliament of tanners, held at *Lostwithiel*, 11 Car. 1., and is as follows:—"We present and affirm that by common prescribed standing right, any tinner may bound any wastrel lands within the county of *Cornwall* that is unbounded or void of lawful bounds, and also any several and inclosed land that hath been anciently bounded and assured for wastrel, by delivering of toll tin to the lord of the soil before that the hedges were made upon it, and also such and so much of the prince's several and inclosed customary land within the ancient duchy assessionable manors as hath been anciently bounded with turfs, according to the ancient custom and usage within the said several duchy manors, and not otherwise, the tinner paying out of such land so bounded the usual toll only as is generally paid within the Stannaries, that is, the fifteenth dish or quart; saving in

such places where a special custom hath limited another rate of toll (a)."

The plaintiff proved, that the toll tin belonging to the Duke had been in lease from the time of Queen *Elizabeth* to different persons; that the Rev. Mr. *Donnithorne*, and, after his death, certain trustees for his family, had been lessees for several years immediately preceding the present lease; that the present lease was granted in consideration of the surrender of the lease preceding it which had been granted in 1797, and a fine of 18,500*l.* (11,942*l.* of which was paid for the surrender). He put in several ancient documents, purporting to be answers of conventional tenants to interrogatories put to them by certain commissioners; which interrogatories, however, were lost. The 9th and 10th answers, which were objected to, but received in evidence, were as follows:—

"To the 9th article, further we say, we know no tin works within the said manor but such as are kept under bounds, which do belong to the owners thereof; and when any tin is wrought, the tenth part thereof ought to be paid to the lord of the manor for toll thereof.

"To the 10th article, we say, that the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33*s.* 4*d.*, as by the records thereof, remaining with the auditor of the duchy of *Cornwall*, appeareth; unto which, for the more certainty, we refer ourselves."

In order to prove that Mr. *Donnithorne*, when lessee, had received toll from this mine, by *Puckinghorne*, his toller, a weighing-book was produced from a blowing house at *St. Austell*, in the handwriting of a deceased clerk. It was proved, that tin is brought there generally by captains of mines or tollers, who are usually, though not always, known there, and who are asked from whence it is brought; that, when brought, a part is selected, and from the produce of

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*Exch. of Pleas,* that sample the fineness and weight of the whole is calculated and entered into the book, and the value is paid to the person bringing it upon such calculation at fixed rates. The delivery is always public, and the book is open for inspection. The clerk is also chargeable for the amount of tin he enters as received. By the stannary laws (*a*) it is directed, that "Every such buyer of block tin shall enter in the blowing-house book where he shall blow such block tin so by him or them bought, the quantity of such tin and the names of the person or persons of whom he bought the same; and it shall be free for any person whatsoever to inspect such blowing-house books." The following and one or two similar entries were admitted after objection.

*The Executors of the Rev. Mr. Downithorne,  
per Mr. Jno. Puckinghorne.*

1782.

July 5.

|                | Cwt.  | qrs. | lbs. |                |
|----------------|-------|------|------|----------------|
| Pit Moor       | Toll  | 0    | 3    | 19 at 12       |
| Fat Work       | Rough | 0    | 3    | 26 at 10       |
| Buckler's Mine | Toll  | 1    | 0    | 24 12 <i>½</i> |
| Down-a-foot    | Toll  | 0    | 1    | 1              |

The defendant offered in evidence a verbal declaration, by the late Mr. *Rashleigh*, who had purchased the manor from the duchy, (the minerals being reserved), as to the boundary of the waste of the manor. This was objected to, and rejected. He also offered in evidence a lease between the Prince of *Wales*, as Duke of *Cornwall*, and the late Mr. *Carlyon*, dated 28th *February*, 1798, as evidence for the same purpose. By that lease, the Duke demised to Mr. *Carlyon*, for 99 years, determinable on lives, "All that piece or parcel of the common, called *Tewington Common*, within the manor of *Tewington*, parcel of the ancient possessions of the duchy of *Cornwall*, in the said county of *Cornwall*, containing, by estimation, about 24 acres of land, separated and divided on the east side thereof from a certain common, called *Boscundle Common*,

(e) Pearce, 55.

the land of *Thomas Carlyon*, Esq., by stone posts, marked with the letter B., and numbered with the figures 1, 2, 3, 4, 5, 6, 7 and 8, bounded on the west, &c. &c.," with a reservation of minerals. This was objected to, and rejected.

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The jury found for the plaintiff 61*4l.* for the toll, calculated at one tenth. In *Michaelmas Term* following, *Coleridge*, Serjt., moved for a new trial, on the ground of the improper reception and rejection of the evidence above-mentioned. As to the weighing books, he contended, that in all the cases where entries &c. by deceased persons have been received in evidence, the persons making them have had knowledge of the facts they state; whilst here, there was no obligation by the stannary laws to specify the mine, and the clerk could only know it from the assertion of the person bringing the ore; and even sometimes he did not know who that person was. On this point, however, the Court held, that it was not necessary that the deceased person should have his own knowledge of the fact stated; that, if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight, not the admissibility of the evidence; and the Court refused the rule on that point, and granted it as to the others.

*Follett, Bere, and Butt shewed cause.*—As to the answers, they contended, that they were statements made by deceased persons upon matters with which they must have been acquainted, and therefore were admissible on the ground of reputation. *Chapman v. Cowlan* (*a*). As to the declarations of Mr. *Rashleigh* and the reception of the lease, that the interests in the surface and the mine were totally different, that Mr. *Rashleigh* had no interest in the latter, and that his declarations as to the extent of the waste belonging to him ought not, therefore, to bind the owner of the mine. That after the Duke had demised away the mines,

(*a*) 13 East, 10.

*Recd. of Pleas,* he could not by any declaration or lease derogate from or affect the interest in them; that the mines having been continually in lease should be considered as a distinct interest from the surface; and that, although a premium had been given for the renewal, yet still the new lease was to be considered as merely a continuation of the former, which was in existence at the time of making the lease to Mr. *Carlyon*; the more particularly that one of the lives in the former lease was admitted to be still alive. That, even if the lease were in strictness admissible, it ought to produce little effect; and therefore a new trial ought not to be granted on its account alone, unless the Court could see it would probably have altered the verdict: and they cited *Doe d. Lord Teynham v. Tyler* (a).

*Coleridge*, Serjt., *Talfourd*, Serjt., and *Cowling*, contra, contended, that the answers were in the nature of ex parte depositions, and therefore not admissible against freeholders, *Freeman v. Phillipps* (b); that the conventional tenants were evidently interested in extending the wastes over which they claimed a right of common at a nominal rent, and therefore had an interest adverse to the freeholders; that the answers might be given, in order to make evidence for themselves; that even presentments of copyholders are not admissible against freeholders, they having no power to inquire into the rights of the latter (c); that all the cases where they have been received have been questions between copyholder and copyholder or lord, as *Roe v. Parker* (d), *Chapman v. Cowlan* (e); that the persons did not appear to have been tinniers or to have sufficient knowledge of the facts stated; that the toll of one tenth, stated in the ninth answer, was entirely unsupported by usage, and therefore inadmissible, *Weeks v. Sparke* (f); and that the tenth answer was nothing more than a

(a) 6 Bing. 561; 4 Moo. &  
Payne, 377.

(d) 5 T. R. 26.

(b) 4 M. & Selw. 486, 491.

(e) 13 East, 10.

(c) See 2 Scriv. Cop. 422, 3.

(f) 1 M. & Selw. 679.

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statement of a particular fact, and therefore not within the rule as to reputation. That the declarations of Mr. *Rashleigh* and the lease were admissible on the ground of reputation, *Barnes v. Mawson* (*a*), and also as being against the interest of the parties making them; that the distinction between the mines and the surface was immaterial, the plaintiff's right to the mine having been put as dependent on that to the surface, and therefore any declaration as to the latter was admissible. That the lease might have been considered as a declaration accompanying an act done, the Duke forbearing to grant more land to the east, because it was already Mr. *Carlyon's* property, *Stanley v. White* (*b*). That the lease was also admissible on account of identity of interest, the plaintiff claiming under the Duke and having taken a new interest by the surrender of the old lease, for which he had paid a fine. That it was an important document; and, if the rejection of it was wrong, there ought to be a new trial, since the Court could not see, amongst the great mass of evidence produced on both sides, that it might not have made a difference in the verdict, *Doe d. Barrett v. Kemp* (*c*).

*Cur. adv. vult.*

The judgment of the Court was now delivered by—

**PARKE, B.**—On the motion for a new trial, in this case, on the ground that Lord *Lyndhurst* received improper evidence for the plaintiff, and rejected admissible evidence for the defendant, several points were made; all of which have been disposed of, either on the motion for a rule *nisi* or on the argument on shewing cause, except three. The first is, whether the answers of the conventional tenants to certain articles (the 9th & 10th) were properly received in evidence for the plaintiff. The plaintiff offered in the first instance to read these answers to more of the articles; but, it appearing that they were not signed by any freehold

(*a*) 1 Mau. & Selw. 77.  
(*b*) 14 East, 332, 341.

(*c*) 5 Moo. & Payne, 173; 7  
Bing. 332.

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tenants, Lord *Lyndhurst* refused to admit them. It was then stated that some were admissible as evidence of reputation, and Lord *Lyndhurst* said that he should admit all that were; and the two answers to the 9th and 10th articles were offered and received, on the supposition that they were so. The objection now taken is, that the answer to the 9th article is not admissible, not because reputation on such a subject is not evidence, it being a question of the custom of mining in a particular district, but because it comes from the customary tenants, who in that character have nothing to do with the mines; and it is insisted, that it is a requisite qualification of hearsay evidence on such a subject, that it ought to be derived from those who are themselves concerned in mining, or receiving the dues of the mines. That hearsay evidence on some such subjects cannot be received, unless with the qualification that it comes from persons who have a special interest to inquire, is clear. Thus, in cases of pedigree, it must be derived from relatives by blood, or from the husband, with respect to his wife's relationship: it is not admissible, if it proceeds from servants or friends. *Johnson v. Lawson* (*a*). And in this description of hearsay evidence the line is clearly defined. So, in cases of rights or customs, which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood, *per Lord Ellenborough, in Weeks v. Sparke* (*b*). Therefore, in *Rogers v. Wood* (*c*), a document purporting to be a decree of certain persons, the Lord High Treasurer, Chancellor of the Exchequer, and under Treasurer, Chief Baron, and Attorney and Solicitor General, who had no authority as a Court, was held to be inadmissible evidence on the ground of reputation, on the

(*a*) 9 Moo. 183; 2 Bing. 86. (*b*) 1 Mau. & Selw. 689. (*c*) 2 B. & Ad. 245.

question, whether the city of *Chester*, before it was made a county of itself, formed a part of the county palatine, because those personages had from their situations no peculiar knowledge of the fact. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary; and in *The Duke of Newcastle v. The Hundred of Broxtowe (d)*, justices of the peace at the sessions of the county, within which the district was alleged to be, were held to have sufficient connexion with the subject in dispute, to make the statements in their orders admissible. Where the right is really public—a claim of highway, for instance—in which all the King's subjects are interested, it seems difficult to say that there ought to be any such limitation; and we are not aware that there is any case in which it has been laid down that such exists. In a matter in which *all* are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shewn to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value, and not the admissibility of the evidence. In the present case the alleged custom does not seem to be one in which all the King's subjects have an interest, but only such as may choose to become adventurers in mines. Therefore hearsay from any persons wholly unconnected with the place in which the mines are found, would not only be of no value, but probably altogether inadmissible. But those under whose estates the minerals lie, with respect to which the custom exists, and who are more likely than others living at a distance to become adventurers, and, consequently, subject to its

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(a) 1 Nev. & M. 601; 4 B. & Ad. 273.

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operation, are in our opinion sufficiently connected with the subject to make these declarations evidence; more especially as the very form in which they are given, shews that they were consulted as persons having competent knowledge upon the matters inquired into. An observation was made in the course of the argument that all evidence of reputation was inadmissible, unless it was confirmed by proof of facts. We think that such proof is not an essential condition of its reception, but is only material as it affects its value when received; and indeed if such proof were required, there is amply sufficient in the present case. Another objection to the admission of these documents was, that the answer to the 10th article was hearsay evidence, not of a *custom* but of a *particular fact*. And so, undoubtedly, it is; and it ought not to have been received: but it seems to have been admitted in consequence of Lord *Lyndhurst's* attention not having been called to its contents, and the objection was not taken, after his offer to receive all the answers that were evidence of reputation, that this particular answer was in truth nothing more than a statement of a particular fact. We therefore think that there should be no new trial on this ground.

The remaining objections are, that two pieces of evidence offered on behalf of the defendant were improperly rejected.

1st. It was argued that certain declarations of the late Mr. *Rashleigh*, as to the extent of his own claim to the waste, which claim excluded the *locus in quo*, ought to have been received in evidence. We think that they were rightly excluded. Mr. *Rashleigh* purchased the manor of *Tewington* (with the exception of the minerals) from the Prince of *Wales* as Duke of *Cornwall*, in September 1798, and died before this suit. And it was urged that his declarations were evidence on several grounds—

*First*, That they were against his own interest. But that circumstance alone is not enough to render such declarations admissible, though it occurs in many of the

cases which have been established as exceptions to the general rule, that no hearsay evidence can be received, viz. entries of deceased receivers, incumbents, &c. and declarations of deceased occupiers as to their own title. It is then said, *secondly*, that this falls within the principle of such last-mentioned declarations. But we think it does not. An occupier who is proved to be in possession of a given piece of ground is *prima facie* presumed to be owner in fee. And his declaration has been held to be receivable in evidence, when it shews that he was only tenant for life or years. This is a well-established exception to the general rule. In this case, however, there is no proof that Mr. *Rashleigh* was in possession of the *locus in quo*. If he had been, and had declared that he had no title to it, but was tenant at will to Mr. *Carlyon*, the case would have fallen within the established exception. But this is a case in which a person merely declares that he is entitled as far as a certain point, but no further; and this declaration, taken altogether, can hardly be said to be against his interest, for, whilst he disclaims his right to one part, he affirms it as to another. It does not appear to us that this statement falls within the principle of those made by deceased occupiers, and therefore we are satisfied that it was properly rejected. It was then, *thirdly*, contended, that this was a declaration accompanying an act; but the answer is, that there was no act which it accompanied or explained. *Lastly*, it was urged that it was evidence of reputation of the boundary of the manor; but it was in truth only a declaration as to the extent of Mr. *Rashleigh's* own property. He was not speaking of the boundaries of the *manor*, which might, for any thing he said, have included all Mr. *Carlyon's* estate, but he spoke only of his own waste.

The last objection, is that the declaration of the Prince contained in a lease of *February*, 1798, was improperly rejected. In the description of the parcels in that lease from the Prince to *Thomas Carlyon*, they are described

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as separated on the east side from a common called *Boscundle Common*, the land of Mr. *Carlyon*, by certain stone posts; and it was therefore contended that this amounted to an admission that *Boscundle Common*, the land in which the mines in question were worked, was Mr. *Carlyon's*. This lease was rejected on the ground that there was a lease of the mines and toll of tin then outstanding dated in 1797, which lease was surrendered to the Prince in 1810 (*a*), and a new one then granted, under which the plaintiff claimed; and Lord *Lyndhurst* thought the admission of the Prince was not receivable in evidence to affect the first lessee, or the plaintiff, who afterwards had the interest in the lease.

We, however, are of opinion, that the plaintiff cannot be considered as claiming by any title prior to 1810. The first lease is entirely at an end by surrender, and the second begins in that year; and consequently any admission of the Prince made before that time, which is relative to the matter in issue, and concerns the estate in the mines, is evidence against the lessee who claims under the Prince by title subsequent.

This admission certainly falls under that description, inasmuch as it is an admission that the surface of the *locus in quo* under which the plaintiff now claims the minerals, on the ground that it was part of the wastes of the manor in 1798, was at that time private property.

It may be that the supposed admission may be readily explained, and may not weigh in the least against the very strong evidence of the right of the Prince to the mines in question, from the actual perception of toll from them for a considerable period; but we cannot on this account refuse to submit the question to the consideration of another jury. The authority of *Doe d. Lord Teynham*

(*a*) Note, the lease on which the action was founded, was executed in 1815, as stated in the second count, the one in 1810 hav-

ing been cancelled in consequence of a mistake in it, and the other substituted.

v. *Tyler* (a), was quoted to shew that the Court have a power to refuse a new trial where evidence has been improperly rejected, if in their judgment the rejected evidence ought to have no effect, and there is enough to warrant the verdict against the party on whose behalf that evidence was offered, supposing it to have been admitted. Something to the same effect had fallen from Sir *James Mansfield* in *1 Taunt.* 14, and from Lord *Tenterden* in *Tyrwhitt v. Wynne* (b). But we cannot help thinking that the rule is there laid down much too generally; and it is obvious that if it were acted upon to that extent, the Court would in a degree assume the province of the jury; and besides its frequent application would cause the rules of evidence to be less carefully considered; and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the rejection or reception of improper evidence: a course productive of great delay and inconvenience. In some cases, no doubt, the Court may refuse a new trial when the witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness, and not disputed, *Edwards v. Evans* (c), or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of evidence, and *certainly* set aside upon application to the Court as an improper verdict.

We cannot say, however strong our opinion may be on the propriety of the present verdict, that, if the lease had been received, it would have had no effect with the jury; nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been set aside as improper; and therefore we think that there must be a new trial.

Rule absolute.

(a) 4 M. & Pa. 377; 6 Bing. 561. (b) 2 B. & A. 559. (c) 3 East, 451

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DICAS v. LAWSON.

Where it appeared clearly that the attendance of a witness at the trial would have been of no use to the party subpoenaing him, the Court refused to grant an attachment against him for disobeying the subpoena.

**I**N this case *F. V. Lee* applied for a rule for an attachment against Lord *Brougham and Vaux*, for a contempt of this Court, in not appearing at the trial of this cause pursuant to a subpoena. The affidavit in support of the application stated that the writ had been duly served upon Lord *Brougham*, and that his reasonable expenses had been at the same time tendered, and that the evidence of his Lordship was material and necessary for the plaintiff. [Lord *Abinger*, C. B.—The affidavit does not shew in what respect his Lordship's evidence was material.] That has never been required. [Parke, B.—The only purpose for which Lord *Brougham* was subpoenaed, was, to prove the application of the libel to the plaintiff, which was not controverted at the trial: his evidence, therefore, could not be material.] It is positively sworn that his Lordship was a material and necessary witness; and the ground upon which the Court grant attachments in such cases is the contempt in not obeying its process.

Lord *ABINGER*, C. B.—I agree that such an affidavit would in general be sufficient where the Court knows nothing of the circumstances; but in this case we have the assistance of the notes of the learned Judge who tried the cause, and of the learned Judge himself, and are in full possession of the facts. The purpose for which the noble Lord was subpoenaed is stated to us; and the learned Judge reports from his own recollection that the noble Lord's testimony was not material. When we see that such is the case, we ought not to grant an attachment, or to allow the process of the Court to be used for purposes of needless vexation.

The other Barons concurred.

Rule refused.

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BENWELL and Another v. HINXMAN and Another.

ALL matters in difference in this case were referred to a barrister under an order of reference made by Mr. Baron *Gurney*, dated the 29th of *May*, 1834, so as the said arbitrator should make his award on or before the 28th day of *June* then next ensuing, or on or before such further or ulterior day, not exceeding the 28th day of *July* then next ensuing, as the arbitrator should from time to time appoint and signify in writing under his hand, to be indorsed on the said order, and as the said Court of *Exchequer* or a Baron thereof might order. On the 30th of *May*, the arbitrator enlarged the time to the 28th of *July*. By an order of the 27th of *June*, the time was enlarged by Mr. Baron *Bolland*; and by another order of the same learned Baron, made on the 24th of *July*, the time was again enlarged to the 31st of *December*. Both these orders were made by consent. On the 10th of *December*, the arbitrator made his award, by which he awarded that there was due and owing from the defendants to the plaintiffs the sum of 27*l.* 4*s.* 9*d.*; and ordered and adjudged that payment should be made of that sum on or before the 20th of *January* then next ensuing, in full of all demands; and that upon payment of the said sum, together with all costs and expenses, all further proceedings in the said cause should cease and be no further prosecuted.

*G. T. White* now moved to set this award aside on the following grounds:—*First*, that the arbitrator had no authority to make the award at the time he made it. He submitted

to the plaintiff, which he directed to be paid on or before a particular day, and that upon payment of that sum all proceedings should cease:—*Held*, that the award was final and not conditional; but that the arbitrator had exceeded his authority in giving a particular day of payment.

All matters in difference in a cause were referred by a Judge's order to an arbitrator, so as he made his award on or before a particular day, or on or before such further or ulterior day as he should from time to time appoint by writing under his hand, to be indorsed on the order, and as this Court or a Baron might order. The arbitrator made an enlargement of the time, but this was not confirmed by any order. Afterwards, two orders for enlarging the time were made by a Baron, with the consent of the parties:—*Held*, that an award made before the time appointed by the last mentioned order was valid, and that the orders by consent amounted to a fresh agreement.

The arbitrator found that a sum of money was due from the defendant

*Exch. of Pleas*, that the time had not been properly enlarged, the enlargement on the 30th of *May* not having been confirmed by the Court or a Baron, and the orders of Mr. Baron *Bolland* were not indorsed by the arbitrator. He cited *Mason v. Wallis* (*a*). [*Parke*, B.—In that case no judge's order was obtained by consent, which makes all the difference. The consent of the parties to the enlargement of the time by the orders amounted to a fresh agreement. They might have agreed to another order of reference, and this is the same in effect.] *Secondly*, there are two objections on the face of the award:—*first*, the award is not final. The arbitrator imposes a condition on the defendants. He finds that a sum of money is due and owing to the plaintiffs, and directs that it shall be paid on or before a particular day, and *if* it be paid by that day, all proceedings are to cease. He has thus made the payment on that day conditional to the termination of the proceedings, which renders the award not final. [*Parke*, B.—The arbitrator finds a sum to be due from the defendant, and directs it to be paid on or before a particular day. If he had stopped there, there would have been an end of the question by determining the sum due. The only question then is, was the latter part of the sentence intended to add any qualification? Looking to the whole of the context, it is clear that the arbitrator did not intend that his award should be conditional on the money being paid on the particular day. I think there is no doubt that the award is final.] Then, *secondly*, the arbitrator has exceeded his authority in giving day of payment to the 20th of *January*, and has thereby rendered the whole of the award invalid.

**PARKE**, B.—There is no doubt that the arbitrator had no authority to give day of payment. So far he has ex-

(*a*) 10 B. & Cr. 107; 5 Man. & Ry. 85.

ceeded his authority, and so far the award is invalid, but it is valid for the rest.

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BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

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PRICE v. DAY.

IN this case *Channell* applied for a rule to shew cause why the defendant should not be discharged out of custody, and a bail-bond given by the defendant on a former arrest should not be delivered up to be cancelled, on the ground of irregularity in the arrest.

It appeared, from the affidavits in support of the application, that the defendant had been first arrested on the 24th of *January*; but the defendant's attorney having given the plaintiff's attorney notice that there was an irregularity in the proceedings, the plaintiff discontinued the action, and taxed and paid the defendant his costs. The plaintiff afterwards sued out a fresh writ, upon which the defendant was arrested. It appeared that on the execution of the first writ, the defendant's attorney had given the sheriff an undertaking to procure a bail-bond; and the sheriff, having had no notice of the discontinuance of the first action, said he was bound to detain the defendant on both writs. *Channell*, in support of the application, submitted that there had been in this case a double arrest, because it was the duty of the plaintiff

A party having been arrested, his attorney discovered an irregularity in the proceedings, and gave the plaintiff notice of it, whereupon he discontinued the action, and the defendant's costs were accordingly taxed and paid. The plaintiff afterwards sued out a second writ, upon which the defendant was arrested. On the execution of the first writ, the defendant's attorney gave the sheriff an undertaking to procure a bail bond, and the sheriff having had no notice from the plaintiff of the discontinuance, said he must

drown the defendant on both writs. On a motion to discharge the defendant out of custody:—  
*Held*, that it was unnecessary to give the sheriff notice of the discontinuance; and it not appearing that the defendant had sustained any damage, the Court refused the application.

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to have instructed the sheriff that the first action had been discontinued, in order that the sheriff might give up the undertaking. The plaintiff having omitted to do so, the sheriff now detains the defendant on both writs; and when he was arrested on the second writ, he was constructively in the sheriff's custody on the first writ.

**PARKE, B.**—You mean to contend that the first action was not properly discontinued until the sheriff had notice of the discontinuance. We have inquired from the officers of the Court, and we find that that is unnecessary. If you had shewn that you had sustained any inconvenience resulting from the supposed continuance of the first writ, the Court might have relieved you: but we think you have not shewn that you have sustained any damage.

The rest of the Court concurred.

Rule refused.

**END OF HILARY TERM.**

# I N D E X

TO THE

## PRINCIPAL MATTERS.

### ACCORD AND SATISFACTION.

*See PLEADING.  
PLEAS IN BAR, 2.*

### ACCOUNT STATED.

1. The assignees of an insolvent tenant agreed to pay to the landlord 7*l.* for the last quarter's rent:—*Held,* that the sum could not be recovered on the count upon an account stated, there having been no use and occupation by the defendants. *Clarke v. Webb,* *Page 29*

2. A bill of indictment for a nuisance having been preferred and found at the *April* quarter sessions, 1832, by the plaintiff against the defendant, and the defendant not having filed his plea before the second day of the following sessions, as he was bound to do, according to the practice of the sessions, the prosecutor said he should press for judgment for want of a plea, unless the defendant would consent to pay the costs of the day; and the matter being brought before the Court, the Court said that the defendant must either plead and take his trial, or, he might be allowed to traverse on payment of the costs of the day. The parties then conferred together, and

### ACCOUNT STATED.

an agreement was come to, and the following memorandum was signed by the counsel on both sides:—“Traversed to the next sessions, by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a copy of the replication one month before the sessions.” The prosecutor afterwards got his bill of costs taxed, and the defendant was served with a copy of the *allocatur*, and was applied to for the amount; the defendant objected to two items, which the prosecutor's attorney agreed to take off. The defendant's attorney then offered to give his check for the amount, but not being pressed for, it was not given. The defendant on a subsequent application for payment by the prosecutor's attorney, requested the latter to apply to *B.*, who received his rents, *and he would arrange or pay:*—*Held,* that what took place at the sessions amounted to an agreement binding on the defendant, independently of the order of the Court; and that, taking such agreement together with the promise to arrange and pay after the amount had been ascertained, there was a case to go to the jury

#### ACTION.

*See BILLS AND NOTES, 1, 2, 3, 4.*

1. *Semble*, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction. *Colburn v. Patmore,* 73

2. A local turnpike act enacted that all monies, &c. should be vested in the trustees, to be applied in the order and manner following:—First, in paying costs, charges, &c. in obtaining the act, &c. &c.; in the second place, in defraying the expenses of erecting or providing turnpikes, tollhouses, and other buildings, and repairing the same, and of erecting and making necessary and convenient bridges, &c., and of repairing the road, &c., and otherwise executing the purposes, &c., of the act; and, lastly, in paying the interest and reducing the principal of the money subscribed, &c. &c. In 1823, the plaintiff contracted with the trustees to build a toll-house, which he accordingly completed in 1824. In 1829, the trustees had a meeting, and verbally ordered that money should be raised, and the tradesmen paid:—*Held*, that the right of action accrued when the work was done, and not when the trustees were in funds; and that the Statute of Limitations was a bar, notwithstanding the order in 1829. *Emery v. Day,* 245

#### ACTION ON THE CASE.

*Where not maintainable.*

1. *A.* being indebted to *B.*, *B.* sued out bailable process, which he de-

livered to the sheriff to execute, and the sheriff arrested *A.* whilst he was attending a trial as a witness under a *subpoena*:—*Held*, that an action on the case was not maintainable by *A.* against *B.* for procuring *A.* to be illegally arrested, it not being shewn that *B.* had any knowledge that *A.* was attending as a witness when he delivered the writ to the sheriff to be executed. *Stokes v. White,* 223

2. A defendant's attorney requested a plaintiff's attorney to forbear charging the defendant in execution until next term, and falsely represented to the plaintiff's attorney that he had the authority of the defendant to consent that he should not be charged in execution until the next term; and the defendant's attorney gave a consent in writing to that effect, which omitted to state that the proceedings were stayed at the request of the defendant, according to the rule *Hil. 26 & 27 Geo. 3.* The plaintiff's attorney forbore to charge the defendant in execution until the next term, and the defendant was discharged for want of having been so charged, on the ground that the consent did not state that the proceedings were stayed at the request of the defendant. In an action brought by the plaintiff against the defendant's attorney for the false representation, as having occasioned the damage:—*Held*, that the action was not maintainable. *Hewitt v. Melton,* 232

#### ADMISSION.

The setting out a Judge's order in pleading is not, upon demurrer, to be taken as an admission of the facts stated in the order. *M'Cormick v. Melton,* 525

## AFFIDAVIT.

*See WITNESS.*I. *To hold to bail.*

1. An affidavit to hold to bail stated that the defendant was indebted, &c., on a bill drawn upon, and accepted by the defendant, &c., payable at a day now passed, &c., without expressly stating that the bill was unpaid or dishonoured:—*Held*, sufficient. *Phillips v. Turner*, 597

2. An affidavit of debt on a covenant to pay money, stating that the defendant is indebted to the plaintiff in the sum upon a covenant for the payment of it at a day now past, is good. *Lambert v. Wray*, 576

II. *To set aside Proceedings.*

On a motion to set aside a declaration and all subsequent proceedings, on the ground that the defendant has not been served with process, it is not sufficient for the defendant to swear that he has not been personally served with any copy of the process, and that the writ was served by mistake on his brother, who resided in the same house, but he must state further that the copy of the writ served did not come to his possession or knowledge. *Phillips v. Ensell*, 374

III. *Defects in.*

1. An affidavit in support of an application by a sheriff to set aside a regular attachment against him for not bringing in the body, must state that the application is made on his behalf, and at his expense. *Rex v. The Sheriff of Surrey*, 581

2. On an application by the bail to stay proceedings on the bail-bond on payment of costs, the affidavit stated that the application was made by them “at their own expense, and for their own indemnity:”—*Held*, that the affidavit was irregular for not

complying with the rule 59 Geo. 3.  
*Call v. Thelwell*, 780

3. An affidavit on the part of the defendant, which is intitled ‘C. D. (the defendant) at the suit of A. B. (the plaintiff), cannot be read. *Richard v. Isaac*, 136

## AFFRAY.

Trespass for assault and false imprisonment, and taking the plaintiff to a police-station. Plea, that the defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated *the defendant and his servants* in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house; which the plaintiff refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff, for the cause aforesaid, and took him into custody. It appeared in evidence that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plain-

tiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house.

*Held*, first, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray.

*Held*, secondly, that the plea was not substantially proved, inasmuch as the alleged assault on the defendant himself was not proved. *Timothy v. Simpson*, 757

#### AGREEMENT.

*See ACCOUNT STATED.*

FRAUDS, STATUTE OF.

PLEADING, *Pleas in bar*, 2.

1. On the 28th *May*, *A.* entered into an agreement with *B.* for twelve months, for the performance of various literary labours, to be thereafter indicated by *B.*; *A.* to receive from *B.* for the said literary labours the sum of six guineas per week, and not to engage, during the twelve months, in any publication similar to the one of which *B.* was the proprietor. On the 14th *October* in the same year, a new agreement was entered into by the parties, in which *A.* agreed to edite the *Court Journal*, and to devote all his time and attention to the same, except the hours he had already engaged to devote to the superintending of the *C. P.* (a publication with which *B.* was not connected), at a salary of 10*l.* per week:—*Held*, that the second agreement superseded the first; and that *A.* could not recover the six guineas per week for the remainder of the twelve months after the second agreement came into operation. *Patmore v. Colburn*, 65

2. The plaintiff being possessed of a term of years of which two years remained unexpired, demised to the defendant for the remainder of his

term minus three days. By the agreement of demise, the defendant was to pay 100 guineas for the fixtures, and a further sum if he agreed with the superior landlord for a longer term. The defendant remained in possession for about three quarters of a year after the expiration of the original term, and paid the superior landlord for so doing at a higher rate than the rent under the lease. There was an interview between the defendant and the original landlord, at which the subject of a renewal was discussed, but the landlord proved that they came to no agreement personally, and that he referred the defendant to his solicitor:—*Held*, that the defendant appeared to have remained in possession only as tenant by sufferance, and that the plaintiff was not entitled to the further sum. *Simkin v. Ashurst*, 261

3. Where an agreement refers to another document, so that the two papers, in fact, form only one agreement, it is sufficient if one of the papers only bear an agreement stamp.

*Assumpsit* on the following agreement:—"I undertake on behalf of Mr. Peate, (in consideration of Mr. Dicken having this day given me an undertaking to procure Mr. Ward's cheque or note in favour of Mr. Peate for 150*l.*, on account of a debt due from Mr. Chambers to Mr. Peate), that Mr. Chambers shall have credit for that sum in his accounts with Mr. Peate, and that Mr. Ward shall stand in the place of Mr. Peate to that amount; and I further undertake that Mr. Peate shall not personally dispute Mr. Ward's right to deduct that sum from the accounts owing by the colliers of the *Black Rock* colliery to Mr. Chambers."—*Held*, that this agreement shewed a sufficient consideration moving from the plaintiff.

An attorney, entering into an agreement on a *Sunday* for the settlement

of his client's affairs, and thereby rendering himself personally liable, is not a person exercising his ordinary calling within the statute 29 Car. 2. *Peate v. Dicken,* 422

## ANNUITY ACT.

*See STAMP.*

## ANNUITY BOND.

*See COVENANT.*

## ARBITRATOR.

*See AWARD.*

## ASSAULT AND BATTERY.

*See AFFRAY.*

To a declaration containing one count only in trespass for assault and false imprisonment, the plea justified the apprehending the plaintiff on a charge of felony, and proceeded to aver that the plaintiff resisted, whereupon he beat him, &c. At the trial, the justification as to the apprehension for felony was proved; but the defendant did not prove the resistance of the plaintiff. The jury having found for the defendant:—*Held*, that the verdict was right: the defendant having proved as much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged. *Atkinson v. Warne,* 827

## ASSIGNMENT.

*See EVIDENCE, 5, 8.*

An assignment for the benefit of creditors by a farmer and trader of all her "effects, stock, books, and book debts," conveys the cattle on the farm. *Lewis v. Rogers,* 48

## ATTACHMENT.

*See WITNESS, 7.*

1. A personal demand is absolute-

ly necessary before moving for an attachment for nonpayment of costs. *Stunnell v. Tower,* 88

2. Where a rule *nisi* issues to shew cause why an attachment should not issue for not obeying a Judge's order which has been made a rule of Court, and the rule *nisi* is not personally served, but the party appears upon it and objects to the want of personal service, such appearance waives the necessity of a personal service. *Levi v. Duncombe,* 737

3. Upon a reference of a cause and all matters in difference, the arbitrators awarded that the sum of 26*l.* was due from the plaintiff to the defendant, but did not order the money to be paid: the Court refused to grant an attachment for nonpayment thereof. *Hopkins v. Davies,* 846

## ATTORNEY.

*See ACTION ON THE CASE.  
TRESPASS, 5.*

1. Where an action is brought by an attorney without the plaintiff's consent, and the defendant at the trial agrees to withdraw a juror, the Court will not order the attorney acting for the plaintiff to pay the costs of the defendant. *Hammond v. Thorpe,* 64

2. Where, on a motion for judgment as in case of a nonsuit, it appeared that the action was commenced and carried on in the plaintiff's name, without his authority or knowledge; and that the attorney could not be found after diligent inquiry:—*Held*, that this was no answer to the motion, and that the plaintiff's only remedy was against the attorney; but the Court, under the circumstances, enlarged the rule to give the plaintiff time to find the attorney, and granted a rule to shew cause why the attorney should not pay the defendant's costs. *Mudry v. Newman,* 402

## AUCTIONEER.

## Liability of.

The plaintiff, the elder brother and creditor of an intestate, being in possession of the goods of the intestate under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, and he employed the defendant, an auctioneer, to sell the goods. After the sale by the defendant, the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff, but to retain the money until all the creditors should come in, that it might be divided rateably amongst them. No letters of administration were taken out:—*Held*, that the defendant was *prima facie* bound to account to the plaintiff from whom he had received the goods, and even if he would have been at liberty to set up the *jus tertii*, and shew as a defence against the plaintiff that he was bound to account to a third person, still that he was liable, no title being shewn by him in any third person. *Crosskey v. Mills*,

298

## AWARD.

*See PARTNER*, 2.

1. Where a cause is referred, the costs of the suit and of the reference and award to abide the event, the arbitrator need not notice the costs in his award.

There is no distinction with regard to legal and other arbitrators; and the Court will not examine an award because it has been made by one who is not in the profession of the law. *Jupp v. Grayson, and Grayson v. Jupp*, 523

2. The Court will not set aside an award on the ground that the arbitrator has come to a wrong conclusion on the facts, if there be any evidence to support his finding, though they

may not think the arbitrator right in the conclusion he has drawn from such evidence. *Barrett v. Wilson*, 586

3. All matters in difference in a cause were referred by a Judge's order to an arbitrator, so as he made his award on or before a particular day, or on or before such further or ulterior day, as he should from time to time appoint by writing under his hand, to be indorsed on the order, and as this Court or a Baron might order. The arbitrator made an enlargement of the time, but this was not confirmed by any order. Afterwards two orders for enlarging the time were made by a Baron, with the consent of the parties:—*Held*, that an award made before the time appointed by the last-mentioned order was valid, and that the orders by consent amounted to a fresh agreement.

The arbitrator found that a sum of money was due from the defendant to the plaintiff, which he directed to be paid on or before a particular day, and that upon payment of that sum, all proceedings should cease:—*Held*, that the award was final and not conditional; but that the arbitrator had exceeded his authority in giving a particular day of payment. *Benwell v. Hinxman*, 935

## BAIL.

*See HABEAS CORPUS*.

1. The original affidavit of justification of bail filed at chambers was incorrect, and the plaintiff opposed their justification on that ground. The bail justified on a fresh affidavit, which was correct:—*Held*, that the defendant was neither to pay nor receive costs. *Popjoy's Bail et al. Sewarders*, 594

2. Rule 3 of *Trin. Term*, 1 *Will. 4*, applies to country as well as town bail. *Grant's Bail*, 598

## BANKRUPT.

### BAIL-BOND.

#### *Standing as a Security.*

The plaintiff is not entitled to insist upon the bail-bond standing as a security, where the defendant not being in custody, the plaintiff has not declared *de bene esse*. *Call v. Thelwell*, 780

## BANKRUPT.

*See EVIDENCE, 3, 4, 5, 8.*

*PROVISO FOR RE-ENTRY.*

#### I. *Act of Bankruptcy.*

1. *A.*, a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure past and future advances, his leasehold property, with all the stock in trade, utensils, and effects thereon, and also a policy of insurance, as a security for monies advanced or to be advanced. The deed contained a power of sale, and a proviso that the trader should remain in possession until default. The assignment did not include another part of *A.*'s property equal in amount to the debt covered by the security. In an action by *A.*'s assignees, to recover part of the property assigned, the jury found that the deed was not executed in contemplation of bankruptcy:—*Held*, that it was a valid deed, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 443

2. Where a trader assigned by deed all his property in trust for the benefit of his creditors:—*Held*, that it was an act of bankruptcy under 6 Geo. 4, c. 16, s. 3, although, in so doing, he did not intend to defeat or delay his creditors, as, that being the necessary consequence of the assignment, he must in law be taken to have intended it. *Stewart v. Moody*, 777

3. *Quære*, Whether the payment of a country bank note to a creditor, with the intention of giving him a fraudulent preference, is an act of

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## BENCH WARRANT. 945

bankruptcy within the 6 Geo. 4, c. 16, s. 3. *Carr v. Burdiss*, 782

#### II. *Certificate.*

A bankrupt is discharged by his certificate from interlocutory costs ordered by the Court at *Nisi Prius* to be paid by him on a trial, in a cause in which he was defendant, being postponed at his instance, on account of the absence of a material witness, if such costs have been taxed before the bankruptcy.

The certificate must be enrolled before the Court can act upon it, so as to discharge the bankrupt. *Jacobs v. Phillips*, 195

#### III. *Payment within 6 Geo. 4.*

*A.* and *B.*, creditors of a trader, who had committed a secret act of bankruptcy, pressed him for payment, when he offered goods, if a customer could be found. The creditors procured the defendant, to whom they were indebted, to purchase the goods, who with the assent of the trader credited *A.* and *B.* in account. In *assumpsit* by the assignees of the trader for the price of these goods, it was held, that, if the appropriation of the money to *A.* and *B.* was merely in consequence of the direction of the trader, it was revocable, and the plaintiffs might recover; but if it was part of the contract that the payment should not be revocable, it was then a question whether this was a payment within the 6 Geo. 4, c. 16, s. 8<sup>2</sup>, which, *semble*, it was not. *Bradbury v. Anderton*, 486

## BENCH WARRANT.

Where a bench warrant issued by a judge of the Court of King's Bench was executed by a constable to whom it was not directed, out of his own district:—*Held*, in an action of trespass against the constable, that the plaintiff was not bound to demand a

s.s.s

C. M. R.

perusal and copy of the warrant.  
*Gladwell v. Blake,* 636

## BILL BROKER.

*See BILLS AND NOTES, 9.*

## BILLS AND NOTES.

*See EVIDENCE, 7.*

PLEADING, *Pleas in Bar, 5, 11, 13.*

1. A promissory note was made in the following form:—"I promise to pay to *M. A. D.* or bearer, on demand, the sum of 16*l.* at sight."—*Held*, that no action was maintainable without a presentment for sight.  
*Dixon v. Nuttall,* 307

2. *A.*, the payee of a bill of exchange, delivered it to *H.* to get it discounted. *H.* carried it to *B.*, who refused to discount it unless *H.* would indorse it, which he did. *B.* then discounted the bill, but paid over only a portion of the proceeds, and procured it to be discounted. *A.* being compelled to take up the bill at maturity, sued *B.* for the balance left unpaid:—*Held*, that *A.* was entitled to recover, and that the question for the jury was, whether *A.* was in fact the owner of the bill, and not whether *H.* had so represented him to be, in discounting the bill with *B.* *Bastable v. Poole,* 410

3. The payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement, the defendant indorsed the bill, and then the plaintiffs indorsed it:—*Held*, that the defendant's indorsement was equivalent to a new drawing by the defendant, and that he was liable to be sued upon the bill by the plaintiffs:—*Held*, also, that a fresh stamp was not necessary. *Penny v. Innes,* 439

4. The holder of a bill for 18*l.*, which had been dishonoured, agreed to take 8*l.* in cash and another bill for 10*l.*

from the draw cordingly drew same acceptor in the hands o ceptor, without drawer, altered the bill:—*He* being a nullity charged, and liable upon it.

5. Where a fourteen days dence cannot t was not to be was obtained between other

6. Where a of *England* w ing his accep Bank, and on being presente o'clock in th noured for w presented aga in the evenin swer was give for that purpo Bank, althoug o'clock recei bound to pay the usual hou

*Sembler*, tha Bank to hav that they had the bill would day. *Whitak*

7. Where, *A.* promised 20*l.* with law ment, for val this was not : on demand, otherwise tha months after bers,

8. A sum *A.,* was put t *B.*, his solici

mortgage, and the deeds were deposited with *A.* Interest being in arrear, and *A.* pressing for payment, *B.* gave a promissory note, payable three months after date, to *A.*, for the amount of principal and interest; and it was agreed at the time of giving the note, that *A.* should deliver up the deeds to *B.*, and should hold the note till the sale of the mortgaged premises should be completed. When the note became due, *A.* sued *B.* upon it, though the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The Judge left it to the jury to say whether the note was given on a condition precedent, that the deeds should be delivered up:—*Held*, that it ought to have been left to them to say what the consideration of the note was, and whether it had wholly failed or not. *Richards v. Thomas*, 772

*9. W.* and *P.*, brokers in *London*, had in their possession bills of different customers to the amount of nearly 3000*l.*, which had been left with them to raise money upon. They mixed these bills with others of their own to about the same amount, and deposited the whole with *Fs.*, who were merchants and capitalists, for an advance of 3000*l.* then made, and for a preceding advance made a few days before on a promise to bring bills. Evidence was given that it was usual and customary for bill-brokers in *London* to raise money by a deposit of their customers' bills in a mass, and that the bill-broker alone was looked to by the customer who gave the bill-broker dominion over the bill.

In an action brought by *Fs.* on one of the bills against one of the customers who was a party to the bill, the Judge left it to the jury to say whether *Fs.*, the plaintiffs, took the bills from *W.* and *P.*, the bill-brokers, with due care and caution and in the ordinary course of business; and the

jury, being of opinion that they had so taken the bills, found a verdict for the plaintiff:—*Held*, that the defendant, the customer, could not complain of such summing up, and that the Court would not disturb the verdict.

In another action arising out of the same transaction, and which was an action of trover brought by one of the customers (who was himself also a bill-broker) against *Fs.* to recover the value of some of the bills, the Judge directed the jury that the principle laid down in *Haynes v. Foster*, “that a bill-broker who receives a bill from a customer to procure it to be discounted, had no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself, and still less a right to deposit such bill as a security or part security for money previously due from him,” was to be taken by them as the general law; but that, notwithstanding such general rule of law, the parties might contract as they thought proper; and he left it to the jury to say whether the usage set up by the defendants as to the course of dealing in such cases was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill-broker himself, had contracted with reference to that usage: and the jury having found for the defendants, the Court refused to disturb the verdict.

A bill-broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.

*Semble*, that the old established rule of law, “that the holder of bills of exchange indorsed in blank, or other

negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them *bond fide* for value," is not to be qualified by treating it as essential that the person so taking them should take them with due care and caution; but that the person taking them *bond fide* for value, has a good title, though he take them without care or caution except so far as the want of that care and caution may affect the *bona fides* and honesty of the transaction. *Foster v. Pearson*, 849

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*well v. Blake*,

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#### COMMITMENT.

*See CONVICTION.*

#### COMMON PLEAS AT LANCASTER.

1. A motion for a new trial in an action brought in the *Common Pleas at Lancaster* must be made in the court in which the Judge sits who presided at the trial. *Foster v. Jolly*, 703

2. The 26th section of the 4 & 5 Will. 4, c. 62, does not authorize this Court to entertain a motion, in a cause in the *Common Pleas at Lancaster*, to set aside an award made under an order of *Nisi Prius*, though a verdict was taken subject to the award. *Byrne v. Fitzhugh*, 597

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## COVENANT.

In consideration of the sum of 300*l.*  
*D.* and *R. D.* by deed, severally  
respectively, and for their several  
respective heirs, executors and  
administrators, granted, covenanted,  
agreed, to and with *L.* and *B.*,  
heirs, executors, administrators,  
signs, to pay to *L.* and *B.*, their  
ors, &c., one annuity or clear  
sum of 30*l.*, in the shares and  
tions following, viz. the sum of  
ng one moiety of the annuity,  
his executors, &c., and the  
15*l.*, the remaining moiety,  
is executors, &c., to be re-  
said quarterly. The powers  
securing the payment of the  
tained in the deed were  
*L.* and *B.*, jointly, and the  
tained a joint power of  
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se of land, with a joint  
to sell certain stock;  
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trouer by the assignees, the jury may deduct, in their estimate of the damages, the expenses of the sale.  
*Clarke v. Nicholson,* 724

## DEMURRER.

A declaration stated a promise to the plaintiff and *A. B.* now deceased in his lifetime, and in a second count stated, that the defendant was indebted to the plaintiff and the *said A. B.* in his lifetime, but did not aver that he was deceased. The defendant having demurred to the second count:—  
*Held*, that the demurror was frivolous within the 2nd Rule, *H. T. 4 W. 4.*  
*Undershell v. Fuller,* 900

## DEVISE.

### *Construction of.*

*A.* devised certain copyhold lands to his widow, *M. E.*, for life, remainder to his nephew, *J. E.*, and his wife *S. E.*, for their lives, remainder to *S. E.*, (the daughter of *J. E.* and *S. E.*), for life, and after the death of *M. E.*, *J. E.*, and *S. E.*, and of *S. E.*, the daughter, “*to revert to my next male heirs for ever:*”—*Held*, that these words meant “heirs male of the body,” and that as the testator died without issue, the reversion, on the determination of the life estates, descended to the customary heir. *Doe d. Eustace v. Easley,* 823

## DISCLAIMER.

The father of the defendant, and, after his death, the defendant, had held lands by the permission of and under the father of the lessor of the plaintiff, and after the death of the father of the lessor of the plaintiff, the defendant continued to hold the lands. To shew that the tenancy was determined, the lessor of the plaintiff offered in evidence the following letters. The

tenant to the plaintiff, *A. W. M.*, after acknowledging the receipt of a letter from the plaintiff on the subject of the premises in question, he says, “As the circumstances in it are not within my knowledge, I have placed it in the hands of Messrs. *F.*, and have requested them to communicate with you.” The second letter, which was from Messrs. *F.* to the plaintiff, was as follows: “Earl *C.* (the defendant) has given us a letter from you on the subject of some ground you state to have been let by the late Mr. *L.* (the father of the lessor of the plaintiff) in 1811, and which has ever since been in the possession of his lordship’s family. We will thank you to let us have the proofs that it was not the late Earl’s own.” Another letter from Messrs. *F.* requested further information “as to the late Mr. *L.* having a right to let the piece of ground in question to Earl *C.*, as it appears to us that the mere fact mentioned in your letter at the utmost only shews that Mr. *L.* might claim it, and not at all aver that Lord *C.* admitted it even on the representation of his own agent:”—*Held*, that those letters did not amount to a disclaimer.

A disclaimer, in such case, must be before the date of the day of the demise.

An admission, made after the day of the demise, of a disclaimer, must, to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of demise.

*Held*, also, that the letter of the defendant did not confer on the agent any authority to bind the defendant by making a disclaimer. *Doe d. Lewis v. Cawdor,* 398

## DISCONTINUANCE.

A party having been arrested, his

attorney discovered an irregularity in the proceedings, and gave the plaintiff notice of it, whereupon he discontinued the action, and the defendant's costs were accordingly taxed and paid. The plaintiff afterwards sued out a second writ, upon which the defendant was arrested. On the execution of the first writ, the defendant's attorney gave the sheriff an undertaking to procure a bail-bond, and the sheriff having had no notice from the bankrupt of the discontinuance, said he must detain the defendant on both writs. On a motion to discharge the defendant out of custody:—*Held*, that it was unnecessary to give the sheriff notice of the discontinuance; and it not appearing that the defendant had sustained any damage, the Court refused the application. *Price v. Day*, 937

## DISTRESS.

*See LANDLORD AND TENANT*, 3.

## EASEMENT.

*See TRESPASS*, 3.

A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water; and such licence may be revoked, though it has been acted upon.

In 1815, *A.* cut a drain in the land of *B.*, to a spring, the water from which he appropriated as it ran through his own land. In 1833, *B.* stopped the drain:—*Held*, that *B.* was entitled so to do, no right having been acquired by user or length of possession. *Cocker v. Conper*, 418

## EJECTMENT.

*See DISCLAIMER.*

An action of ejectment is not an action within the rules of *Hilary Term*, 3 *Will. 4*, and the declaration

must commence and conclude in the usual form. *Doe d. Gillett v. Roe*, 19

## EVIDENCE.

*See DISCLAIMER.*

FOREIGN JUDGMENT.

HABEAS CORPUS AD TESTIFICANDUM.

LOCAL ACT.

PLEADING, *Pleas in bar*, 7.  
WITNESS.

1. In debt for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney was called by his client to prove the execution of a deed. On cross-examination he admitted that there had been another deed between the same parties, relating to the demised premises, executed after the former, and that he had that deed in Court; but he refused to produce it, relying on his privilege. The defendant then offered to produce parol evidence of the contents of the deed, (without stating what evidence). No notice to produce had been given:—*Held*, that parol evidence was rightly rejected. *Bate v. Kinsey*, 38

2. A trader, being in embarrassed circumstances, executed an assignment of all her "effects, stock, books, and book debts," for the benefit of her creditors. In an action after her death against the assignee, treating him as executor *de son tort*, it was held that a list of creditors made out about the time of the execution of the assignment, by the direction of the assignor, was evidence as part of the transaction, for the purpose of disproving fraud. *Lewis v. Rogers*, 48

3. Depositions of deceased witnesses taken before commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees afterwards appointed pursuant to the 6 *Geo. 4*, c. 16, s. 96, are not admissible in evidence against

the assignees acting under the commission, in an action brought by the bankrupt against such assignees for the purpose of disputing the validity of the commission.

By the course of the office of the sheriff of *M.*, the officer making an arrest was required to make a return in writing, signed by him, of the arrest, and of the place where the arrest took place. A writ having been delivered to *W.*, a sheriff's officer, to arrest *A. B.*, *W.* arrested him accordingly, and made the following return:—"9th November, 1825, arrested *A. B.* in South Molton Street, at the suit of *W. B.*," which return was signed by the officer and sent by him to the sheriff's office on the execution of the writ, and was then filed with the writ according to the course of the office. The writ and certificate were produced by the under-sheriff at the trial:—*Held*, in an action brought by *A. B.* against a third party, that the certificate was not admissible after the death of the officer to prove the place where the arrest was made.

*Chambers v. Bernasconi*, 347

4. In an action by assignees of a bankrupt, admissions of their title as assignees by the defendant in letters addressed to the solicitor to the commission and to one of the assignees, are *prima facie* evidence of title, so as to dispense with strict proof, though there is a plea denying the title of the plaintiffs as assignees, and notice to dispute has been given. *Inglis v. Spence*, 432

5. In an action by a bankrupt against his assignees to try the validity of his commission:—*Held*, that the assignment having been lost before it had been entered of record pursuant to the 6 Geo. 4, c. 16, s. 96, secondary evidence of its contents might be given. *Giles v. Smith*, 462

6. In trespass by the lord of a manor for wreck, a document, dated

in 1639, was offered in evidence, purporting to be the answer of certain persons, tenants of the manor, to a commission, issued by the lord of the manor for surveying the same, in which document it was stated that the lord was entitled to wreck:—*Held*, that this evidence was inadmissible, the title of the lord not being a matter of public concern, and the jurors having no peculiar means of knowledge. *Talbot v. Lewis*, 495

7. Where a note is made payable fourteen days after date, parol evidence cannot be given to shew that it was not to be paid, in case a verdict was obtained in an action brought between other parties. *Foster v. Jolly*, 703

8. Where the defendants claimed title to certain goods under an assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs:—*Held*, that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud.

Trover by assignees of a bankrupt, for certain goods, &c., in the possession of the bankrupt as his property at the time of the bankruptcy, and converted by the defendants since the bankruptcy. Plea—that, before the bankruptcy, the bankrupt assigned and conveyed the goods to the defendants by deed, and that before the bankruptcy they took possession thereof, and kept and retained such possession. Replication—that the defendants did not take possession of the goods before the bankruptcy: on which issue was joined. After a verdict found for the plaintiffs on that issue:—*Held*, that the issue was an immaterial one; and that the assignment, being a transfer of personal property, was sufficient of itself to convey it without possession, the want

of which only amounted to evidence of fraud. *Carr v. Burdiss*, 782

9. A letter containing a libel was proved to be in the handwriting of the defendant, to have been addressed to a party in *Scotland*, to have been received at the post-office at *C.* from the post-office at *H.*, to have been forwarded from *C.* to *London* to be forwarded to *Scotland*, and it was produced at the trial with the proper post-marks, and with the seal broken: —*Held*, sufficient *prima facie* evidence that it reached the person to whom it was addressed, and of a publication to him. *Warren v. Warren*, 250

10. An entry by a deceased person charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge.

Ancient answers of conventional tenants of a manor, stating the rights of the lord of the manor, are admissible in evidence even against the free-holders of the manor; but if they state facts only, e. g., that "the commons of the said manor do belong to the tenants of the said manor unstinted, who have always enjoyed the same under the yearly rent of 33*s. 4d.*, as by the records thereof remaining with the auditor of the duchy appeareth; unto which, for the more certainty, we refer ourselves," they are not admissible in evidence.

Declarations of a deceased lord of a manor, as to the extent of his *rights* over the wastes of a manor, are not admissible in evidence; *aliter*, if spoken of the *extent* of the wastes only.

Reputation is admissible in evidence, though unsupported by usage.

A lease of tin mines and toll tin was surrendered in 1810, and another lease taken, on payment of a fine; part of which was a compensation for the surrender of a former lease. A

statement in a lease of the surface, made by the same lessor, during the existence of the former lease, is admissible in evidence against the lessee in that second lease of the mines and toll.

Where evidence has been improperly rejected, the Court will grant a new trial, unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence. *Crease v. Barrett*, 919

#### EXECUTION.

A writ of *ca. sa.* set aside for irregularity is a nullity, and the taking of the defendant under it is no satisfaction of the judgment.

The setting out a Judge's order in pleading is not, upon demurrer, to be taken as an admission of the facts stated in the order. *M'Cormick v. Melton*, 525

#### EXECUTION OF PROCESS.

##### *Liability of Officer.*

By the practice of a Borough Court, writs of *ca. sa.* were directed to *A.B.*, serjeant at mace of the said borough, and also to *C.D.* and *E.F.*, (naming one or more), persons who were appointed by the serjeant to execute the process of the Court, and who give an indemnity to him. No warrant is ever made out on those writs. The serjeant dismisses the officer at his pleasure, and takes the fees for the execution of process. If it is wished that process should be executed by any body, not being one of the persons so appointed, it is done by the consent of the serjeant on application to him, and in such case a special indemnity against the acts of such person is given to the serjeant. The serjeant is always ruled to return these writs, and he is served personally

with the rule; he does not return them himself, but the officers return them in their own names. The attachment for not returning, &c. issues against the serjeant, and bail-bonds are always taken to him in his name:—*Held*, that the officers were the officers of the serjeant at mace, and that he was responsible for their default in the execution of process. *Morris v. Parkinson*, 163

#### EXECUTORS AND ADMINISTRATORS.

*See LANDLORD AND TENANT*, 4.  
LEGACY DUTY.  
PROVISO FOR RE-ENTRY.

##### *Liability of.*

One of two executors of a deceased tenant for a term of years entered into the demised premises:—*Held*, that such entry did not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 172

##### *Costs under 3 & 4 Will. 4.*

Where an executor sues upon a promise made to himself, and there is a verdict against him, the defendant is not deprived of his costs by the statute of 3 & 4 Will. 4, c. 42, s. 31. *Ashton v. Paynter*, 738

#### FINE.

The City of London is entitled to a fine imposed for a misdemeanour committed within the city, though the fine be adjudged by the Court of King's Bench sitting at Westminster. *The King v. Mayor &c. of London*, 1

#### FIXTURES.

*See INDEBITATUS ASSUMPSIT.*

Where A. took the lease of a house

#### FORFEITURE.

and premises for a term of years, and took the tenant's fixtures in the house at a valuation from the landlord, and afterwards assigned the term to B., by way of mortgage, expressly including the fixtures, and subsequently became bankrupt:—*Held*, that the fixtures were not goods and chattels within the order and disposition of the bankrupt, and did not pass to his assignees. *Boydell v. M' Michael*, 177

#### FOREIGN JUDGMENT.

In an action brought by the syndics of a French bankrupt upon an arbitral sentence and ordonnance, whereby the defendant was adjudged to pay the bankrupt a sum of money:—*Held*, 1st, that the agreement of reference (made in France) was sufficiently proved by an examined copy and the evidence of the attesting witness, it appearing that the original was deposited with a notary at Paris for safe custody, and that it is the established usage in France not to allow the removal of a document so deposited; 2ndly, That the proceedings in foreign Courts must be presumed to be consistent with the foreign law until the contrary is distinctly shewn; 3rdly, That the principle adopted by a foreign jurisdiction in assessing damages cannot be impugned, unless contrary to natural justice, or proved to be not conformable to the foreign law; 4thly, That two out of three syndics of a French bankrupt may sue without naming the third, or stating that the Juge Commissaire has authorized the suit, such appearing to be the rule in France.

*Quære*, whether the objection to the nonjoinder of the third syndic could be taken on the plea of *nil debet?* *Alivon v. Furnival*, 277

#### FORFEITURE.

By a charter of Edw. 4, the crown

granted to the corporation of *Dover* "all penalties forfeited and to be forfeited, &c. of all and every the Barons, &c., in whatsoever Courts the same Barons, &c. should happen to be adjudged." By a charter of *Charles 2*, "all fines, *forfeitures*, &c. in the Courts aforesaid arising, &c." were also granted to the corporation:—*Held*, that under neither of these charters did a forfeited recognizance to appear to answer a charge of misdemeanour pass to the corporation.  
*The King v. Mayor &c. of Dover*,

726

## FRAUDS, STATUTE OF.

*See INDEBITATUS ASSUMPSIT.**PELADING, Pleas in bar, 2.*

*A.*, on the 20th of *July*, made proposals in writing (unsigned) to *B.*, to enter his service as bailiff for a year, *B.* took the proposals and went away, and entered into *A.*'s service on the 24th of *July*:—*Held*, that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the 4th section of the Statute of Frauds.  
*Snelling v. Lord Huntingfield*, 20

## GIVING TIME.

*See GUARANTIE.*

## GOODS CLANDESTINELY REMOVED.

The statute 3 & 4 *Will. 4*, c. 52, s. 20, enacts, that goods taken or delivered out of *any warehouse*, not having been duly entered, shall be forfeited. The King's Warehouse is a warehouse within this clause.

By stat. 3 & 4 *Will. 4*, c. 53, s. 28, if goods, which shall have been warehoused or otherwise secured for home consumption or exportation, shall be clandestinely removed from

or out of any warehouse or place of security, they shall be forfeited. *Quare*, whether the King's house is within this clause?  
*ney-General v. Claude Vondiere*

## GOODS AND CHATTEL.

*See FIXTURES.*

## GUARANTIE.

1. *B.*, in *January*, 1825, gave following guarantie to *A.*, a banker:—"Please to open an account with honour the cheques of, *C.* on *M.* account, for whom I will be responsible." The account was accordingly opened, and advances were made to *A.*. It appeared to be the custom dealing at the bank for the customer to give acceptances occasionally of the balance of their accounts. In *February*, 1827, *A.* ceased to make advances. In *October*, 1827, a statement into the bank was made by *A.* In *February*, 1828, (and not before) *A.* took *B.*'s acceptance at the bank for months for the amount of his balance. It did not appear that *B.* had any knowledge of the course of business at the bank, although he was sold to the bankers:—*Held*, that taking the acceptance was a giving of time to the debtor, and that *B.*, the surety, was thereby discharged. *Howe v. Jones*,

2. Guarantie in the following form:—"I inform you that you are about publishing an arithmetic for him, and have no objection to being answerable as far as 50*l.*; for my reference apply to *B.*" Signed "G. T." wrote this memorandum, and added "Witness to G. T.—J. B." It was forwarded by *B.* to the plaintiffs, who never communicated their acceptance of it to *G. T.* In an action against the latter on the guarantie:—*Held*, that the plaintiffs, not proving notice of acceptance to the defendant,

were not entitled to recover. *Mosley v. Tinkler,* 692

### HABEAS CORPUS.

Where a cause in the Palace Court was removed by *habeas corpus* into the Court of King's Bench, but was remanded back by *procedendo*, and afterwards interlocutory judgment was signed in the Court below, and a writ of inquiry executed:—*Held*, that the bail of the same defendant in another action brought in this Court had no right to remove the cause in the Palace Court again by *habeas corpus*, in order that the defendant might be rendered in discharge of his bail in the action in this Court.

But the Court gave the bail time to render, until fourteen days after the expiration of the custody in the Palace Court, no cause being shewn against so much of the rule for such time. *Lanes v. Hutchinson,* 766

### HABEAS CORPUS AD TESTIFICANDUM.

A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up. *Fennell v. Tait,* 584

### HOLDING TO BAIL.

Where a defendant is arrested and goes to prison, it is “an arrest and holding to bail,” within the meaning of the statute 43 Geo. 3, c. 46. *Preedy v. M'Farlane,* 819

### IMPARLANCE.

Imparlements are abolished by the Uniformity of Process Act. *Nurse v. Geeting,* 567

### INSOLVENT DEBTOR.

**INFERIOR COURT.**  
*See PLEADING, Pleas in bar, 4.*

### INDEBITATUS ASSUMPSIT.

#### I. Where maintainable.

*A.* having occupied a house as tenant to *B.* in which there were certain fixtures which *A.* had purchased on entering the house, and which he had a right to remove during his tenancy, agreed, at *B.*'s request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, *B.* agreeing to take them at a valuation to be made by two brokers. *A.*, at the expiration of his tenancy, delivered up possession of the house to *B.*, leaving the fixtures on the premises. On the following day the fixtures were valued by two brokers at the sum of 40*l.* 10*s.*, and the valuation was signed by them accordingly. *A.* having brought *indebitatus assumpsit* for the price and value of fixtures, &c. bargained and sold, and for fixtures sold and delivered:—*Held*, that the action was maintainable, and that this was not a sale of an interest in land within the 4th section of the Statute of Frauds.

And *semel*, that a note or memorandum in writing was not necessary within the 17th section of that statute relating to the “Sale of Goods” above the value of 10*l.* *Hallen v. Runder,* 268

#### II. Where not maintainable.

Goods were sold upon the following terms:—“7½ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days:”—*Held*, that the vendors could not sue in *indebitatus assumpsit* for goods sold and delivered within the fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained for the goods. *Strutt v. Smith,* 312

## INSOLVENT DEBTOR.

After taking the benefit of the Insolvent Act, a debtor contracted a new debt, and accepted a bill of exchange for the balance of the old and new debt. Being sued upon the bill, he gave a warrant of attorney for the amount; and judgment being entered up upon this warrant of attorney, the Court refused to set it aside. *Philpot v. Aslett,*

85

## INROLMENT.

*See BANKRUPT (certificate).  
STAMP, 1.*

## INDORSEMENT.

*See PRACTICE.  
PROCESS.*

## LANDLORD AND TENANT.

1. A lease contained a stipulation, that, for every acre, and so in proportion for a less quantity of the land which the lessee should *suffer to be occupied* by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, *occupy*, dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course:—*Held*, that the landlord was entitled to the additional rent, this being an occupation of the land by other persons. *Greenslade v. Tapscott,* 55

2. A tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up his hostile

title, not with the intention that he should hold under the lease:—*Held*, that the term was forfeited. *Doe d. Ellerbrock v. Flynn,* 137

3. A tenant gave a bill of sale to a creditor, under which his goods (including certain eatage) were about to be sold, and the landlord, before the sale took place, put in a distress; whereupon it was agreed, that the sale by the creditor should proceed, and that the landlord should be paid his arrears out of the proceeds of the goods and eatage. The plaintiff having purchased the eatage at the sale, put in his cattle to depasture it; and the amount of the sale not being sufficient to cover the arrears of rent, the landlord distrained again, and took those cattle as a distress:—*Held*, (*Parke, B., diss.*) that a contract was to be implied on the part of the landlord not to distrain the cattle of the purchaser of the eatage. *Hortford v. Webster and Deacon,* 696

4. Where an instrument, which was in reality a lease, but which bore an agreement stamp for 15s., was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l.* 10*s.*, but was stamped in 1834 under the provisions of the 37 Geo. 3, c. 136, s. 2, with a stamp of 1*l.*, being the amount of the stamp then in force:—*Held*, that the proper duty had been paid.

A. demised to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The leasee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent:—*Held*, that they

were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract. *Buckworth v. Simpson*, 834

### LEGACY DUTY.

Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest among poor pious persons, in *ten* or *fifteen pounds*, as they should see fit.

If any of the objects of the above bounty should have received to the amount of *20l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to return the duty chargeable on such amount. *In the matter of Wilkinson*, 142

### LEVARI FACIAS.

Lodging a writ of *levari facias* with the registrars of the bishop of the diocese, does not bind the property of the incumbent from the time of its being lodged. *Waite v. Bishop*, 507

### LIBEL.

#### *See VENUE.*

1. The declaration stated that the defendant had been employed by the plaintiff to edit the *Court Journal* for reward, and that he did not perform the duties of editing the same in a proper manner, *but, without the knowledge, leave, authority, or consent of the plaintiff, "falsely, maliciously, and negligently inserted and published in the same a false and malicious libel,"*

&c. That, at the time was exhibited for the falsely publishing and publishing and such process had that the plaintiff that offence, a verdict for the plaintiff was arrested, and injury sustained with the bread not appearing publishing of convicted was with which the *viz.*, the insert

*Semble*, that newspaper, co the publication inserted without consent by the against the edit obtained by such *v. Patmore*,

2. A letter proved to be in defendant, to him a party in Scotland at the post-office at *H* forwarded from *Sco* duced at the tri marks, and will *Held*, sufficient that it reached it was addressee to him.

The plaintiff jointly interested land, of which defendant wrote principally about the conduct of the plaintiff thereto, but against the plaintiff his conduct to — *Held*, that the letter about the as to the proper

tial and privileged, that such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt. *Warren v. Warren,* 250

## LICENCE.

*See EASEMENT.*

## LIMITATIONS, STATUTE OF.

*See ACTION.*

1. A defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit; the plaintiff replied that the cause of action did arise within six years, &c.:—*Held*, that the plaintiff might prove a *quo minus* to have been issued within the six years, and to have been continued down to the time of the defendant's appearance.

On the trial of an issue, whether the cause of action arise within six years next before the commencement of the suit, the plaintiff produced the roll on which the continuances appeared to have been regularly entered up. It appeared from the writs themselves, that the second writ, which was an *alias quo minus*, was tested on a day subsequent to the day of the teste of the first writ:—*Held*, that the roll being right, the Court could not look to any thing else to contradict it. *Dickenson v. Teague,* 241

2. In order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt. *Tippets v. Heane,* 252

3. A writ issued under 2 & 3 Will. 4, c. 39, s. 10, to prevent the operation of the Statute of Limitations, may be returned *non est inventus*

without any attempt at service.  
*Williams v. Roberts,* 676

## LOCAL ACT.

1. A local act provided that no ditch, &c., should be arched over, &c., without the consent of the trustees under the act, under a penalty of 50*l.*:—*Held*, that a surveyor, who, after a sewer had been commenced, directed it to be continued (without the consent of the trustees), had incurred the penalty.

A local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded, need not be proved either to have been examined with the Parliament roll, or to have been printed by the king's printer. *Woodward v. Cotton,* 44

2. By a local act for paving, watching, lighting, and improving the city of *L.*, commissioners were appointed for carrying the act into effect, and a penalty was imposed upon such of them, as, being personally interested in the matter in question, should act as commissioners in the execution of the act. One of the commissioners, being personally interested in the construction of a footpath opposite his own house, attended a meeting of the commissioners, and spoke upon the question of the mode of constructing such footpath:—*Held*, that this was evidence to go to the jury of an *acting* as a commissioner. *Charlesworth v. Rudgard,* 498

MANOR.

*See EVIDENCE, 6.*

## MEMORANDA, 404, 660.

## MISNOMER.

A plaintiff declared by the name of *William Moody*, and the cause pro-

ceeded to issue in that name. It was sworn that the party intended as plaintiff was *John Moody*, but there appeared to be a *William Moody*, a son of *John*, who was connected with the transaction in question. The Court refused a rule to amend the proceedings by inserting the name of *John* instead of *William*; observing, that if he, *John Moody*, were really the person originally intended as plaintiff, the misnomer could not be taken advantage of at the trial. *Moody v. Aslatt*, 771

## MONEY HAD AND RECEIVED.

There being mutual accounts between *A.* and *B.*, the latter met *C.*, *A.*'s brother, to settle them. Two accounts were brought by *C.* The first contained various items of money received by *B.* for *A.* *B.* settled and signed this account. *C.* then produced another account between the parties respecting other items, which *B.* disputed, and refused to settle. No evidence was given of money had and received but the above:—*Held*, that *A.* was entitled to recover upon the count for money had and received. *Lorymer v. Stephens*, 62

## NEW RULES.

*See PLEADING—Declarations*, 1,  
*Pleas*, 6.  
*VENUE*, 1, 2.

## NEW TRIAL.

*See PLEADING.*  
*TRESPASS*, 1.

1. Where the jury in a penal action have found a verdict for the defendant through a misapprehension of the law, the Court will grant a new trial, though the mistake did not proceed from any misdirection of the Judge. *Gregory v. Tuffz*, 310  
2. Where the defendant permitted

the examination of an incompetent witness for the plaintiff to proceed, on the plaintiff's attorney undertaking to produce a release after the trial, his refusing so to do is no ground for a new trial. *Hemming v. English*,

568

3. In the case of a writ of trial, no new trial will be granted on the ground of the verdict being against evidence, when the verdict is for less than 5*l.* *Packham v. Newman*, 585

4. Where a material witness for the plaintiff is prevented from attending by the fraud and practice of the defendant's attorney, the plaintiff ought to apply to the Judge to put off the trial, or ought to withdraw the record. If he proceeds to trial and is nonsuited, the Court will not grant a new trial. *Terquand v. Dawson*,

709

5. Where evidence has been improperly rejected, the Court will grant a new trial, unless with the addition of the rejected evidence, a verdict given for the party offering it would be clearly and manifestly against the weight of evidence. *Crease v. Barrett*,

919

## ORDER BY CONSENT.

*See ACCOUNT STATED*, 2.  
*AWARD*, 3.

## OUTLAWRY.

On a motion to set aside proceedings to outlawry, on the ground that the writ of *capias* varied from the form given by the Uniformity of Process Act, it appeared that the writ was sued out by the plaintiff in person, and that the indorsement on the writ was—"This writ was issued by *C. L.*, of No. 6, *Berners Street*, *, the plaintiff with-in-named, in person;" the form given by the act being "who resides at," &c. The writ was filed on the 4th*

of *June*, and might have been seen by the defendant at any time afterwards in the office:—*Held*, that it was too late in *M. T.* to take advantage of the objection, even if it were maintainable, though it was positively sworn that the plaintiff never knew of the outlawry till six weeks before.

*Held* also, that it was a mere irregularity in the writ, and that the objection ought to have been taken by summons at chambers.

In this case the writ was issued on the 17th of *April*, and was returned *non est inventus* on the 4th of *June*, the practice being that it could not be returned within four months except under a Judge's order:—*Held*, that it was no objection to the writ that it was returned before the four months expired, as it was not necessary to state the Judge's order in the writ, and that it must be assumed it was done correctly.

*Held* also, that the *exigent* is not a writ within the meaning of the 12th section of the Uniformity of Process Act.

The writ of *exigent* directed the proclamations to be made at the parish church of the parish in which the defendant resided:—*Held*, that it was sufficient, it not appearing from any affidavit that there was any nearer church or chapel; and that, at all events, it was not necessary to mention that in the *exigent*. *Lewis v. Davison*, 655

#### PARTICULARS OF DEMAND.

*See TRESPASS*, 3.

#### PARTNERS.

1. *A.*, the patentee of an engine, and *B.*, were partners under the firm of *A. & Co.* *C.* purchased the licence of erecting such engines in *Cornwall*. *D.* contracted with *A. & Co.* to erect an engine in *Cambridgeshire*. *A.* in vol. I.

formed *D.* that *B.* and *C.* were his partners, and *C.*, on being applied to said it was correct. During the making of the engine, *C.* frequently came to inquire how the work went on. *D.* sued *B.* and *C.* for a breach of the contract, when *C.* proved his limited interest in the patent. The jury having found that *C.* was not a partner, the Court refused a new trial. *Ridgway v. Philip*, 415

2. One partner has no implied authority to bind his co-partner to a submission to arbitration, respecting the matters of the partnership. *Adams v. Bankart*, 681

#### PATENT.

1. Where, in summing up his invention, a patentee stated it thus:—“My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair as above described:”—*Held*, that this was not a claim to the principle of the lever, but to an application of that principle to a certain purpose by certain means, and that the patent was good. *Minter v. Wells*, 505

2. A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril:—*Held*, that the Court, taking the whole of the latter specification together, would infer that the maundril was not to be used, and that the latter patent was good. *Russell v. Cowley*, 864

#### PAYMENT OF MONEY INTO COURT.

In an action of *indebitatus assumpsit*

T T T C. M. R.

*sit* by the master of a ship, for wages, against *A.*, *W.*, *D. S. W.*, and *S. W.*, the plaintiff proved a contract in the handwriting of *W.*, signed *A.*, *W.* & *Co.*, by which contract he was engaged as master of a vessel, at a yearly salary. He also proved services under the contract for several years; and he then put in a rule to pay into Court a sum of money which was not equal to the amount of the wages. It appeared, on the part of the defendants, that *D. S. W.* was not a member of the firm of *A.*, *W.* & *Co.*, and was not an owner of the ship in question. The defendant, in the course of his case, went into accounts including a variety of items, being disbursements on ship's account, on the one hand, and items to the credit of the owners, on the other:—*Held*, that, under the circumstances, the whole account was referable to one contract, and that the four defendants, having paid money into Court, were precluded from setting up, that one of the defendants, *D. S. W.*, was not a party to the contract. *Ravenscroft v. Wise*, 203

**PAYMENTS, APPROPRIATION OF.**  
*See BANKRUPT.*

**PENAL ACTION.**  
*See NEW TRIAL.*

**PLEADING.**  
*See EVIDENCE, 8.*

**I. Declarations.**

*See WAY.*

1. An action of ejectment is not an action within the rules of Hilary Term, 3 Will. 4, and the declaration must commence and conclude in the usual form. *Doe d. Gillett v. Roe*,

19

2. The plaintiff declared in the commencement of his declaration as

assignee of the sheriff, and then set forth a bond to himself:—*Held*, no ground of demurrer. *Reynolds v. Welsh*,

580

3. In an action brought by a landlord against a tenant for not properly cultivating a farm, the declaration alleged that the defendant undertook to cultivate and manage the farm and lands according to the course of good husbandry and the custom of the country where the farm was situate; and then went on to aver, that, according to the course of good husbandry and the custom of the country, the defendant ought to have had about one-half only of the arable lands in corn, one-fourth in seeds, and the remaining fourth in turnips or fallow; and alleged as a breach, that the defendant had more than one-half in corn, &c. &c. The defendant pleaded, traversing the custom as alleged in the declaration. At the trial, the jury found that the custom was not as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighbourhood:—*Held*, that the plaintiff had tied himself up to the precise custom as alleged in the declaration, and, having failed to prove it, was not entitled to recover. *Angerstein v. Handson*,

789

4. In debt on a judgment for the plaintiff in an inferior Court, the declaration must allege that the cause of action in the original suit arose within the jurisdiction of the inferior Court. *Read v. Pope*,

302

**II. Pleas in bar.**

1. It is not necessary to conclude the plea under the 29 Car. 2, with a *contra formam statuti*. *Peate v. Dicken*,

422

2. Declaration stated that the defendant guaranteed the plaintiff in supplying goods to one *H. H.* Plea, that, before breach, it was agreed

between the plaintiff and the defendant that the plaintiff should supply goods to *H. H.*, and that they should be paid for at the end of three months by a bill at four months to be accepted by the defendant, which agreement the plaintiff, before breach, accepted in discharge of the former agreement, and released the defendant from the performance thereof:—*Held*, on demurrer, that the second agreement was an original undertaking, and did not require to be in writing under the Statute of Frauds; that it was not an accord and satisfaction; and that it was a defence to the action as being a substituted contract. *Taylor v. Hilary*, 741

3. To an action by the drawer against the acceptor of a bill of exchange, the defendant pleaded that before, &c., it was agreed between the plaintiff and defendant that the plaintiff should consign to *J. N.* certain goods, and that out of the proceeds of those goods the plaintiff should direct *J. N.* to pay to the defendant a sum equal to the amount of the bill; and that in case the proceeds should not have arrived in *England* when the bill became due, the plaintiff should renew the bill. The plea then stated, that the proceeds had not arrived when the bill became due; that the plaintiff declined to draw another bill; that it was thereupon agreed that the defendant should write to *J. N.*, directing him to pay the whole of the proceeds to the plaintiff. That the defendant did thereupon write such letter and delivered it to the plaintiff. The plea lastly averred, that the defendant had not received any consideration for the payment of the bill. On special demurrer:—*Held*, that the plea was repugnant. *Byas v. Wylie*, 686

4. The defendant pleaded to an action of *assumpsit*, as to all except

20*l. 9s.*, *non assumpsit*; and as to that sum that the defendant being in embarrassed circumstances, the plaintiff and other creditors agreed to take 5*s.* in the pound, and that the defendant was ready and willing to pay the amount of the composition, but the plaintiff refused to receive it, and discharged the defendant from tendering or paying the composition:—*Held*, that the plea was no answer as to the sum agreed to be taken for composition, as no consideration was stated for the plaintiff's discharging the defendant from the payment of it. *Cooper v. Phillips*, 649

5. To a declaration on certain bills of exchange by the indorsees against the acceptors, the defendants pleaded, first, that the bills were accepted for the accommodation of the indorser, and without any consideration for the acceptance; and that they were indorsed to the plaintiffs after they became due: secondly, that the bills were indorsed after they became due; and that, before the indorsement, the indorser was indebted to the defendants in a sum of money exceeding the amount of the bills:—*Held*, that the pleas were ill. *Stein v. Yglesias*, 565

6. It is no plea to debt on a bail-bond, that there was no affidavit of debt filed in the action against the principal.

Since the rules of *H. T. 4 Will. 4*, a plea must conclude with a verification, or to the country. *Knowles v. Stevens*, 26

7. Where a defendant may by statute give matter of justification in evidence under the general issue, he will not be permitted to plead the general issue and also a special plea of justification. *Neale v. M'Kenzie*, 61

8. On the 5th February, an account was stated between the parties, and the balance was in favour of the

plaintiff. On the 10th March another account was stated, and the balance was in favour of the defendant. The plaintiff afterwards sued upon the first account stated, and the defendant (after the new rules) pleaded *non assumpsit*:—*Held*, that, under this plea, he could not avail himself of the defence of the second account stated. *Fidgett v. Penny*, 108

9. A plea that the defendant was discharged by the order of the Insolvent Debtors' Court from the causes of action in the declaration mentioned (*if any*), is bad on special demurrer. *Gould v. Lasbury*, 254

10. A plea justifying in trespass as a distress for rent, stated that the plaintiff held and enjoyed as tenant under the defendant at the rent of &c., without shewing any reversion in him:—*Held*, that the plea was good. *Hooker v. Nye*, 258

11. To a declaration against the indorser of a bill of exchange, the defendant pleaded, that the action was commenced before a reasonable time for the payment of the bill had elapsed after notice of dishonour:—*Held*, bad. *Siggers v. Lewis*, 370

12. To a declaration on promises to pay on request, the defendant pleaded as to part, that he *has paid* the same, and as to the residue *non assumpsit*, and concluded the whole plea to the country:—*Held*, bad on special demurrer. *Ensall v. Smith*, 522

13. In an action of *assumpsit* on a bill of exchange by indorsee against indorser, the defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he, the defendant, had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. Issue being taken on this plea, a verdict was found for the defendant. On a motion for judgment for the plaintiff, *non ob-*

*stante veredicto* :—*Held*, that the plea was sufficient, after verdict, but that it would have been bad on demurrer. *Easton v. Pratchett*, 798

14. The setting out a Judge's order in pleading, is not, upon demurrer, to be taken as an admission of the facts stated in the order. *McCormick v. Mellon*, 525

### III. Replication.

*See TRESPASS*, 3.

### IV. Replication de injuria.

Where in trespass *q. c. f.* the defendant in his plea claims an interest in land, a replication of *de injuriā* is bad on general demurrer. *Hooker v. Nye*, 258

## POLICY OF INSURANCE.

A policy of insurance contained a warranty "not to sail for *British North America* after the 15th of *August*." The vessel, on the morning of the 15th of *August*, was cleared at the Custom-house of *Dublin*, and ready for sea. She was then lying in the Custom-house Dock, which opens into the river *Liffey*, which forms part of *Dublin* harbour. She was afterwards, on the same day, hauled out of dock and warped down the river *Liffey* about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to *Quebec*, in *North America*. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river, and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail for *Quebec* on the 15th of *August*, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voy-

age, and not merely and solely to fulfil the warranty:—*Held*, that the vessel was in the prosecution of her voyage on the 15th of August, and that the warranty not to sail for *British North America* after that day had been complied with. *Cockrane v. Fisher*, 809

### PART DUTY.

The corporation of *Trao* in 1795 made a lease of the office of Meter with all fees, emoluments, &c. arising from the measuring of coal, &c. imported. It was proved that they had been accustomed for nearly sixty years to receive these payments upon all coal imported into the port. The learned Judge told the jury that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not expressly advise them that they ought to make such presumption, unless some evidence to the contrary appeared, neither did he explain to the jury the nature of a port duty, and state, that as such the claim in question might be referred to a modern grant. The Court granted a new trial. *Jenkins v. Harvey*, 877

### PRACTICE.

*See AFFIDAVIT.*

ATTORNEY.

BAIL.

BAIL-BOND.

COGNOVIT.

HABEAS CORPUS.

IMPARLANCE.

OUTLAWRY.

VENUE.

#### I. Amendment.

1. The plaintiff, after obtaining an order to amend his declaration, with leave to the defendant to plead *de novo*, may abandon that order and proceed to trial without procuring it to be rescinded. *Black v. Sangster*,

521

2. Where, in the body of a *ca. sa.*,

the sum recovered was stated to be 100*l.*, but the writ was properly indorsed for 88*l.* only, the amount of the damages and costs, and the defendant was only taken in execution for that sum, the Court, on motion allowed the *ca. sa.* to be amended, or payment of costs, and discharged a prior rule which had been obtained to set it aside, without costs. *Arnell v. Weatherby*,

881

#### II. Attachment.

The defendant, being taken under an attachment for non-performance of an award, went to prison, and, though he was able to pay, he refused so to do, perversely declaring that he would rather go to gaol than pay. The plaintiff then commenced an action upon the award; and on motion that the plaintiff might be compelled to discontinue, or the defendant might be discharged out of custody, the Court ordered him to be discharged, on giving a bond to the plaintiff with sureties to the Master's satisfaction, conditioned to the same effect as in the case of a recognizance of bail. *Earl of Lonsdale v. Whinney*, 591

#### III. Issue.

The dates of the pleadings must be inserted in the issue; but not the form of the action. *Ball v. Hamlet*,

575

#### IV. Judgment as in case of a Nonsuit.

1. In a country cause where issue is joined in Easter vacation, the defendant may move in Michaelmas Term for judgment as in case of a nonsuit. *Williams v. Edwards*, 588

2. It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff is poor, and has neglected to furnish his attorney with money to conduct the suit. *Cleasby v. Poole*,

581

#### V. Plea, signing.

A plea of the Statute of Limitations

## VI. Process.

1. A stack of hay was sold by the defendant to the plaintiff, with liberty to keep it on the defendant's premises for a certain time, but the hay was seized as a distress before the expiration of that time:—*Held*, that it was not necessary to indorse on the writ of summons sued out for the above cause of action the amount of debt and costs. *Perry v. Patchett*, 87

2. Where the writ of summons was "in an action on the case," and the affidavit to hold to bail was for goods sold and delivered, and the amount of the debt was indorsed on the writ:—*Held*, that the writ was irregular, and that the defendant was entitled to be discharged out of custody. *A writ of summons directed to the "sheriffs" of Middlesex is irregular. Barker v. Weedon*, 396

3. Where, upon the arrest of a defendant, the copy of the process delivered to him was indorsed:—"The plaintiff claims 75*l.* 10*s.* for debt, and 4*l.* 4*s.* for costs; and if the amount thereof be paid to the plaintiff, or his attorney, within four days from the *arrest hereon*, proceedings will be stayed":—*Held*, to be irregular under R. II. H. T. 2 Will. 4. *Hooper v. Waller*, 437

4. Where a *capias* was directed to the "sheriffs" of Middlesex, instead of "sheriff":—*Held*, an irregularity. *Jackson v. Jackson*, 438

5. A *capias* issued after the Uniformity of Process Act, upon an affidavit sworn before the passing of that act before the deputy signer of the bills of Middlesex, is not irregular. *Young v. Beck*, 448

6. An indorsement upon a *capias* that the plaintiff claims 20*l.* for debt, "with interest thereon from the 10th day of March," is sufficiently certain. *Coppelo v. Brown*, 575

7. Where the writ of summons was to answer in trespass on the case, and had no indorsement of the sum demanded; and the particulars of demand, which had been delivered with the notice of declaration, shewed a claim for wages—the Court refused to set aside the writ for irregularity, the plaintiff not having declared. *Davies v. Jones*, 582

8. Bail cannot apply to set aside the *capias* against their principal, on the ground of the action being described therein as an action of trespass on the case upon promises.

Such a *capias* is irregular only, and not void.

The mistake must be taken advantage of by an application to set aside the writ for irregularity. *Gurney v. Hopkinson*, 587

9. When, in the copy of the writ served on the defendant, the letter "s" was omitted in the word "she":—*Held*, to be immaterial, as it could not mislead.

Where, on the copy of the writ delivered, the indorsement was, "if the amount thereof be paid within four days from the arrest or service hereof":—*Held* sufficient, and that the words "arrest or" might be rejected as surplusage. *Sutton v. Burgess*, 770

10. Where, in the body of the writ of *capias* the word *Middlesex* was by mistake written "*Middesex*":—*Held*, that it was not a valid objection, and was no ground for ordering the defendant to be discharged out of custody. *Colston v. Berends*, 833

11. A writ issued under sect. 10 of 2 & 3 Will. 4, c. 39, to prevent the operation of the Statute of Limitations may be returned *non est inventus* without any attempt at service. *Williams v. Roberts*, 676

## VII. Signing Judgment.

1. Where an unsigned plea is delivered, the plaintiff is not entitled to

sign judgment before the time for pleading has expired. *Macher v. Billing*, 577

2. Where a cause was tried before the sheriff under the 3 & 4 Will. 4, c. 42, on the 23rd of *May*, and the plaintiff having obtained a verdict, costs were taxed and judgment signed on the 27th:—*Held*, upon the construction of the 18th section of that act, that the judgment was regular. *Nicholls v. Chambers*, 385

3. Where an order for seven days' time to plead was obtained on the 15th of *May*, and the plaintiff signed judgment on the 22nd, the Court set aside the judgment as having been signed too early, although the pleas which had been delivered on the 22nd were irregular in several respects. *Pepperell v. Burrell*, 372

### VIII. Stay of Proceedings.

A summons to refer an attorney's bill for taxation, and a Judge's order thereupon, do not operate as a stay of proceedings, so as to prevent the attorney from suing upon the bill. *Williams v. Roberts*, 676

### IX. Trial.

1. Where a defendant died in the course of the sittings in term, the Court refused to allow the cause to be tried on the last day of term to which the sittings had been adjourned for that purpose; nor would they interfere, by appointing for the trial another day out of term, and entering the verdict as of the sittings in the term. *Johnson v. Budge*, 647

2. Where the under-sheriff refuses to send his notes of the trial, a motion for a new trial must be made on affidavit of the facts. *Thomas v. Edwards*, 382

3. *Semble*, that the sheriff, on a writ of trial, cannot put off the trial, but that the application must be made to a Judge. *Packham v. Newman*, 584

4. In a country cause ordered to be

tried before the sheriff, the plaintiff has the same period of time for proceeding as if no such order had been made. *Butterworth v. Crabtree*,

### X. Undertaking.

In an action against the plaintiff the extortion of his officer, the officer undertook, by a written memorandum in consideration of a sum of money being accepted and proceeded to stay, to pay the sum of money with costs, in seven days, and, on default thereof, that the plaintiff should have judgment. The undertaking not being complied with, the Court refused a rule nisi to compel the officer to perform his undertaking, he not being an officer of the Court. *Brown v. Gerard*,

### PRESENTMENT.

A promissory note was made in the following form:—"I promise to pay to M. A. D., or bearer, on demand the sum of 16*l.* at sight:"—*Held*, no action was maintainable without presentment for sight. *Dixon v. tall*,

### PRESUMPTION OF IMMEDIATE RIGHT.

*See PORT DUTY.*

### PRIVILEGED COMMUNICATION.

*See LIBEL, 2.  
SLANDER.*

### PRIVILEGE FROM ARREST.

1. A King's chaplain is privileged from arrest, and if he has been arrested, and has given a bail-bond, the Court will, on motion, order the bond to be cancelled. *Byrn v. din*,

2. *Somerset herald* having been arrested on mesne process, the Court refused to discharge him on mo

but left him to sue out his writ of privilege. *Leslie v. Disney,* 578

#### PROBATE DUTY.

A testator, domiciled and dying in *England*, leaves personal property situated in a foreign country, which is afterwards brought into this country, and administered here:—*Held*, that probate duty was not payable in respect of this property, under 55 Geo. 3, c. 184. *Att.-Gen. v. Hope,* 530

#### PROVISO FOR RE-ENTRY.

Lease for twenty-one years to *A. B.*, his executors, administrators, and assigns. Proviso that if *A. B.*, his executors, administrators, or assigns should become bankrupt or insolvent, or suffer any judgment to be entered against him, &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine and the lessor have power to re-enter. *A. B.* died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt:—*Held*, that the lessor's right of re-entering thereupon accrued. *Doe d. Bridgman v. David,* 405

#### RECOGNIZANCE.

*See FORFEITURE.*

#### RELEASE.

*See STAMP.*

#### RENDER.

*See HABEAS CORPUS.*

#### SEQUESTRATION.

A sequestration obtained by the assignees of an insolvent incumbent operates only from the time of publication, and does not entitle the assignees to the arrears of composition for tithes due before publication.

Lodging a writ of *levi facias* with

the registrar of the bishop of the diocese, does not bind the property of the incumbent from the time of such lodging. *Waite v. Bishop,* 507

#### SET-OFF.

1. Where the general issue and another plea are pleaded, the defendant is not entitled to give a set-off in evidence upon a notice, but he is bound to plead the set-off. *Duncan v. Grant,* 383

2. Where malt had been sold by *B.* to *A.* by an illegal measure, and after such sale a settlement of accounts took place between the parties:—*Held*, in an action by *A.* against *B.* for work and labour, that the latter was entitled to set-off his demand for the malt. *Owens v. Denton,* 711

#### SHIPPING.

*Seamen's Wages.*

A seaman entered into articles of agreement to serve on board a ship “bound from the port of *London* to the *South Seas* to procure a cargo of sperm oil, and to return therewith to the port of *London*, where the voyage was to end,” and he was to receive, in lieu of wages, a 95th share of the net proceeds of the cargo. By the 6th article of the agreement it was stipulated, that “no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at *London*, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles.” The vessel sailed upon the voyage and procured a cargo; but, on her voyage home, was disabled and condemned in a foreign port. The cargo was transhipped, and, with the exception of a small portion sold for repairs, was de-

livered in *London*, and the freight upon it paid. The seaman accompanied the cargo in the vessel to which it was transhipped, but died before it reached *London*:—*Held*, that the representatives of the seaman were not entitled to his share of the proceeds of the cargo under the agreement, but only to a *quantum meruit* for his services on board the second vessel. *Jesse v. Roy*, 316

## SIDE CLERK.

The office of side clerk of the Court of *Exchequer* still exists, notwithstanding the 1 *Will.* 4, c. 70, and 2 & 3 *Will.* 4, c. 110. *Stokes v. White*, 223

## SLANDER.

*Privileged Communication.*

*A.*, the tenant of a farm, required some repairs to be done at the farm house, and *B.*, the agent of the landlord, directed *C.* to do the work. *C.* did it, but in a negligent manner, and during the progress of it got drunk; and some circumstances occurred which induced *A.* to believe that *C.* had broken open his cellar door and obtained access to his cyder. *A.*, two days afterwards, met *C.* in the presence of *D.*, and charged him with having broken his cellar door, and with having got drunk and spoilt the work. *A.* afterwards told *D.*, in the absence of *C.*, that he was confident *C.* had broken open the door. On the same day *A.* complained to *B.* that *C.* had been negligent in his work, had got drunk, and he thought he had broken open his cellar door:—*Held*, that the complaint to *B.* was a privileged communication, if made *bona fide*, and without any malicious intention to injure *C.*:—*Held* also, that the statement made to *C.* in the presence of *D.* was also privileged, if done honestly and *bona fide*; and that the circumstance of its being

made in the presence of a third person does not *of itself* make it unauthorized; and that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether *A.* acted *bona fide*, or was influenced by malicious motives:—*Held* also, that the statement to *D.*, in the absence of *C.*, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false. *Toogood v. Spyring*, 181

## STAMP.

*See AGREEMENT.**BILLS AND NOTES*, 3, 7.*LANDLORD AND TENANT.*

1. The condition of a bond (after reciting that *M. M.*, the obligee, had contracted with *S. B.*, the obligor, for the sale to him, *S. B.*, of a messuage, &c., in consideration, amongst other things, of an annuity of 150*l.* to be paid to her, *M. M.*, during her life, by *S. B.*, by four quarterly payments in the year; and further reciting that, on the contract of the purchase of the messuage, it was agreed, that, for better securing the payment of the said annuity, the said *S. B.* should execute that bond), was, for the payment of the said annuity at the times, &c. This bond was stamped with a 1*l.* 15*s.* deed stamp:—*Held*, that the bond was properly stamped, and that it did not require any enrolment under the Annuity Act, and that if such enrolment had been necessary, the want of it could not have been taken advantage of under the plea of *non est factum*. *Mestayer v. Biggs*, 110

2. The defendant executed a release to one of his witnesses in the usual manner, and gave it to his attorney. At the trial it appeared that another witness would require to be released. His name was accordingly

inserted in the release, and the defendant re-executed it before it had been delivered to either witness:—*Held*, that this re-execution did not make a fresh stamp necessary.

*Quære*, whether one stamp is sufficient on a release to two witnesses?  
*Spicer v. Burgess*, 129

#### SURRENDER.

*A.*, the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to *B.* for the remainder of the term, the house and cottages being in the possession of under-tenants, and the stable and yard in that of *A.* The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. *B.* took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. *A.* paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold:—*Held*, that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 31

#### TITHES.

On a bill filed to enforce the payment of certain specified sums in lieu of tithes, it was proved that the respective occupiers of certain houses, either ancient or built upon ancient sites, and situate in that part of the parish of *St. Andrew, Holborn*, which is without the city of *London*, had for the last hundred years uniformly paid certain specified and invariable sums in respect of each house: but such payments were never made by the owners or occupiers of houses built

upon new sites. The payments varied in amount on different houses, and were not in any distinct rate or proportion to the value of the houses *inter se*, and were not general through this part of the parish:—*Held*, first, that the Court were warranted in inferring from these facts, that the payments had been made from time immemorial; secondly, that they could assign a legal origin for such payments, and that they could legally be enforced by the rector of the parish. *Beresford v. Newton*, 901

#### TREBLE COSTS.

A local act prohibited the commissioners therein named, under a penalty, from acting in the execution of the act, when personally interested. By another clause, if an action was brought against any person “for any act or thing done in execution of, or under the authority of the act,” and the plaintiff should be nonsuited, the defendant was to recover treble costs. The defendant, a commissioner, was sued for acting, &c., being personally interested, and the plaintiff was nonsuited:—*Held*, that the acting as a commissioner, &c. was not “an act or thing done in execution of, or under the authority of the act,” and that the defendant was not entitled to treble costs. *Charlesworth v. Rudgard*, 896

#### TRESPASS.

1. *Trespass*.—First count for seizing and carrying away certain *goods, chattels, and effects* of the plaintiff, to wit, &c. Fifth count for tearing away, severing, and removing divers fixtures of the plaintiff. *Pleas*—first, Not guilty; secondly, a justification to first count, taking the *goods and chattels* as a distress for rent due on a tenancy. *Replication*—denying the tenancy; and issue thereon. The Judge at the trial directed the jury that the

justification covered the whole declaration; but the jury found a verdict for the plaintiff, with one farthing damages:—*Held*, that the justification was *prima facie* an answer to the seizing and carrying away in the first count; and that the plaintiff, if he intended to rely on some of the articles being fixtures, ought to have replied that fact; but that the justification was no answer to the trespasses stated in the fifth count:—*Held*, also, that, as the jury had not acted according to the misdirection, but had given damages, the Court would not grant a new trial, on the ground of the misdirection. *Twigg v. Potts*, 89

2. The defendant, a schoolmaster, improperly, and under a claim for money due for schooling, refused to allow the mother of an infant scholar to take her son home with her, and the son was, though frequently demanded by the mother, kept at school during a part of the holidays, but there was no proof that the infant knew of the demand or denial, or that any restraint had been put upon him; an action of trespass for assault and false imprisonment having been brought by the infant:—*Held*, that it was not maintainable. *Herring v. Boyle*, 377

3. Trespass for breaking and entering, on the 1st January, 1830, and on divers other days and times, &c., one close, called the Railroad, and one other close formerly used as a railroad, &c. Pleas (amongst others), that *A.*, *B.*, and *C.* were owners of the closes on each side of the *locus in quo*, which was a railway made by the plaintiffs under the authority of an act of Parliament; that the adjoining closes contained minerals, and that, according to the custom of the country, the minerals could only be conveniently conveyed by means of a railroad across the *locus in quo*. The plea then justified the trespasses for that purpose, and for the convenient and

necessary occupation of the adjoining closes. Replication, protesting the soil and freehold, *de injuria absque residuo cause*. Another plea alleged that the occupiers of the adjoining closes had, for twenty years, *as of right*, and without interruption, used and been accustomed to use the privilege and easement of passing and repassing, &c., and laying down railroads across the plaintiffs' railroad. Replication to this plea, traversing the claim of *right*. New assignment of other and different purposes, to which there was judgment by default. The particulars complained of trespasses committed by the defendants in April and May, 1830, in a close “which now is or heretofore was a rail or tramroad,” and destroying the plates of the same, and laying down others. The evidence was, that the defendant, in February, 1829, took up some of the plates of the plaintiffs' railway, and altered the course of part of it, carrying it over their own land, and made a transverse railroad, which crossed the site of the old railroad, and also the new railroad:—*Held*, that the particulars were sufficient.

Upon the issue with regard to the more convenient occupation of the adjoining closes, there was much evidence on both sides, the plaintiffs giving evidence to shew, that, in constructing the transverse railroad, the defendants had an ulterior object in view. The Judge left it to the jury to say, whether the transverse railroad was constructed *bona fide* for the more convenient occupation of the closes, or for some other object:—*Held*, that this direction was right.

Upon the issue with regard to the twenty years' enjoyment of the easement:—*Held*, that the defendants were bound to shew an uninterrupted enjoyment, as of right, during that period; and that the plaintiffs might prove, under that issue, applications

by the defendants during the twenty years for leave to cross their railroad, and that it was not necessary for them to reply such licence specially under 2 & 3 Will. 4, c. 71, s. 8. *Monmouthshire Canal Co. v. Harford*, 614

4. A., the owner of certain freehold houses and land with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard, and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In trespass by one of the tenants against the landlord for excluding him from the yard, the Judge left it to the jury to say whether the landlord, at the time of the demise, had reserved the yard:—*Held*, that this was a misdirection, the question being whether he had demised it, and not whether he had reserved it. *Herbert v. Thomas*, 861

5. Trespass is not maintainable for holding an attorney to bail, notwithstanding his privilege. *Noel v. Isaac*,

758

#### TURNPIKE.

*See Action.*

#### TURNPIKE TOLLS.

Where tolls are payable by persons passing along a turnpike road, and an act of Parliament exempts and prohibits the trustees of such road from repairing a certain portion of it, and imposes the liability on others, but is silent on the subject of tolls, such portion still continues for the purposes of toll to be a part of the turnpike road. *Phipson v. Harrett*, 473

#### USE AND OCCUPATION.

*See EXECUTORS.*

#### USER.

*See EASEMENT.*

#### VENDOR AND PURCHASER.

On a sale by auction of leasehold

property, one of the conditions of sale was, that the vendor "should not be obliged to produce the lessor's title," the vendee having *alibi* discovered certain defects in the lessor's title:—*Held*, that, notwithstanding the above condition, he was entitled to insist upon those defects. *Shepherd v. Keatley*,

117

#### VENUE.

1. The insertion of venue in a declaration contrary to rule 8, *Hilary Term*, 4 Will. 4, is not a cause of demurrer. *Farmer v. Champneys*, 369

2. The improper insertion of venue in a declaration, contrary to the new rules, is not an irregularity for which the declaration can be set aside; the course is to apply to a Judge at chambers to strike it out. *Townsend v. Gurney*,

590

3. The venue cannot be changed on the usual affidavit, where *part of the demand arises on a bill of exchange*. *Walther v. Syers*, 596

4. An application to change the venue on special grounds, must be made the subject of a distinct motion, and where the venue has been improperly changed on the affidavit in a case where *part of the demand was on a bill of exchange*, such special circumstances furnish no answer to an application to discharge the rule for changing the venue. *Dawson v. Bowman*,

594

5. Where, in an action for a libel, the venue was laid in *London*, and the defendant moved to change it to *Lincoln* on the usual affidavit, and on a rule being obtained to bring back the venue, it appeared from the affidavit that the libel had been published in *London* as well as *Lincoln*:—*Held*, that the plaintiff was entitled to have the venue brought back to *London*, without entering into an undertaking to give material evidence there. *Clements v. Newcome*,

776

6. In an action of covenant on a

farming lease, the Court will not change the venue before issue joined.  
*Maude v. Sessions,* 86

7. An action of assumpsit for the breach of an implied contract to keep premises in repair, is transitory, and not local. *Buckworth v. Simpson,* 834

## WARRANT.

*See BENCH WARRANT.  
CONSTABLE.*

WARRANT OF ATTORNEY.  
INSOLVENT DEBTOR.

## WAY.

*Construction of 2 & 3 Will. 4, c. 71, s. 8.*

*See TRESPASS, 3.*

Where a way had been used adversely and under a claim of right, for more than twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester:—*Held*, that under the act 2 & 3 Will. 4, c. 71, this user gave no right as against the bishop, and did not affect the see.

*Held* also, that, as the user could not give a title as against all persons having estates in the *locus in quo*, it gave no title as against the lessee and the persons claiming under him, and that no title was gained by an user which did not give a valid title as against the bishop, and permanently affect the see.

The declaration for disturbance of the above-mentioned right of way alleged that the plaintiff was possessed of a certain wharf, close, and premises, and by reason thereof ought to have had, and still of right ought to have, a certain way from this wharf, close, and premises, into &c. (describing the way), as to the said wharf and premises belonging and appertaining:—*Held*, that the declaration was sufficient, and that the way might be

claimed as appurtenant to the plaintiff's possession of the land at the time of the injury committed. *Bright v. Walker,* 211

## WITNESS.

*See EVIDENCE.*

## HABEAS CORPUS.

1. Where a person called only to produce a document is sworn as a witness by mistake, and a question is put to him, which he does not answer, the opposite party is not entitled to cross-examine him. *Rush v. Smith,* 94

2. Where several defendants appear by different attorneys and counsel, the latter are entitled to cross-examine the witnesses, and address the jury separately. *Ridgway v. Philipps,* 415

3. *A.* conveyed to *B.* a close of land, and afterwards conveyed the same close to *C.*, who mortgaged it to *A.* In trespass by *B.* against *C.* and others for breaking and entering the close, it was held that *A.* was a competent witness for the defendant. *Simpson v. Pickering,* 527

4. The wife of a publican, living sixty miles from Lancaster, was subpoenaed to give her evidence at the assizes there, and 2*l. 2*s.** was given to her for expenses. She did not make any objection to the amount, as being insufficient. On shewing cause against a rule for an attachment against her, it appeared that she had an infant in bad health at the breast; and that the inside fare of the coach from Liverpool (the road through which town was the most convenient route to Lancaster from the place where she resided) was 1*l. 1*s.** The Court thought that she might reasonably require an inside place, and that the money was insufficient, and they refused to make the rule absolute for an attachment against her. *Sembler*, that the affidavit for an attachment

for not appearing as a witness, in pursuance of a *subpoena*, need not shew that the witness was called in Court on the *subpoena*, especially if the witness never did attend the assizes.  
*Dixon v. Lee,* 645

5. Where a local act empowers the directors and overseers of the poor of a parish to sue and be sued in the name of their clerk, in an action for goods supplied to the directors, a person who was one of the directors at the time when the goods were sup-

plied is a competent witness for the defendant. *Fletcher v. Greenwell*, 754

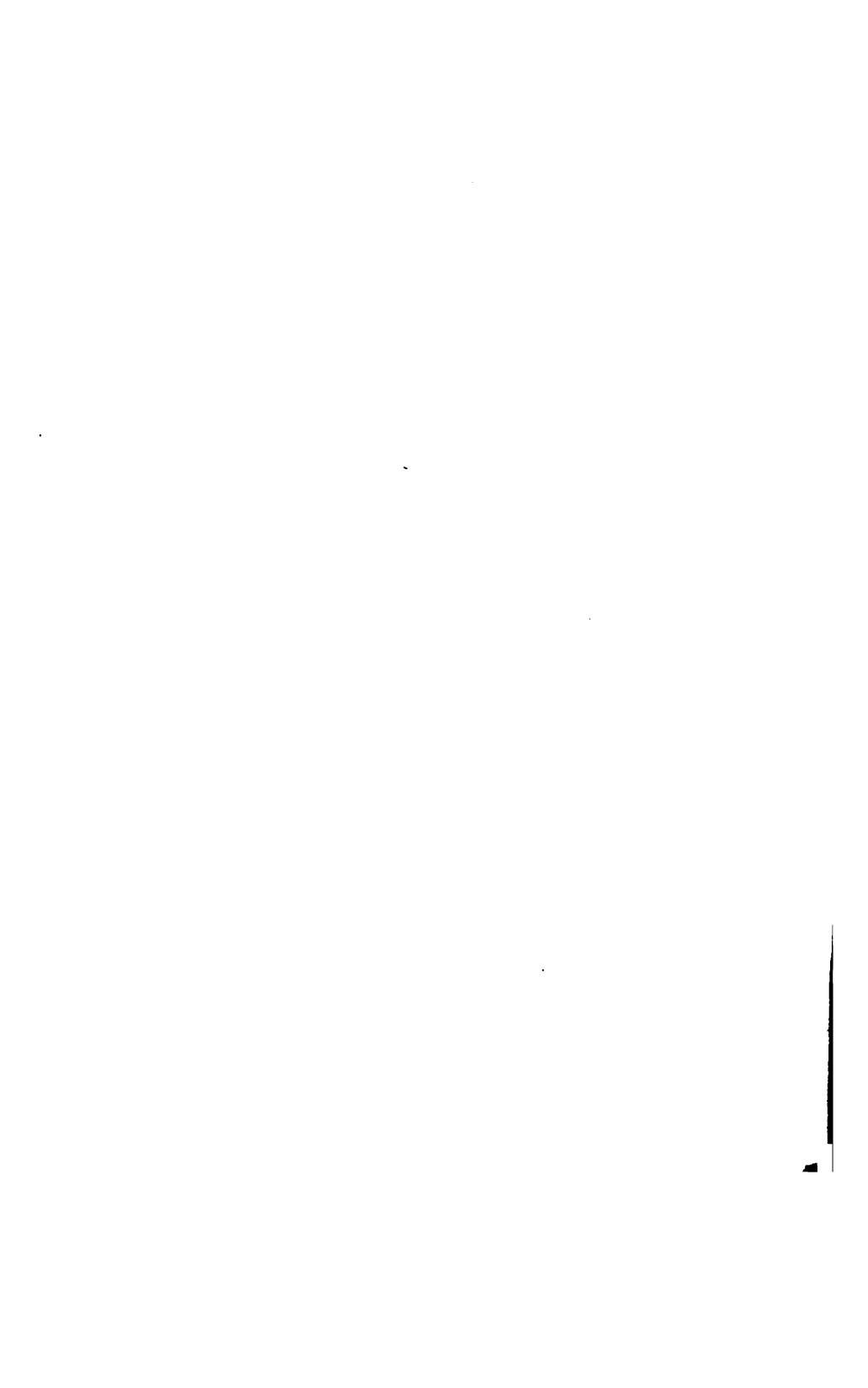
6. It is in the discretion of the Judge whether he will permit a witness to be recalled. *Adams v. Baakart*, 681

7. Where it appears clearly that the attendance of a witness at the trial would have been of no use to the party subpoenaing him, the Court refused to grant an attachment against him for disobeying the *subpoena*.  
*Dicas v. Lawson,* 934

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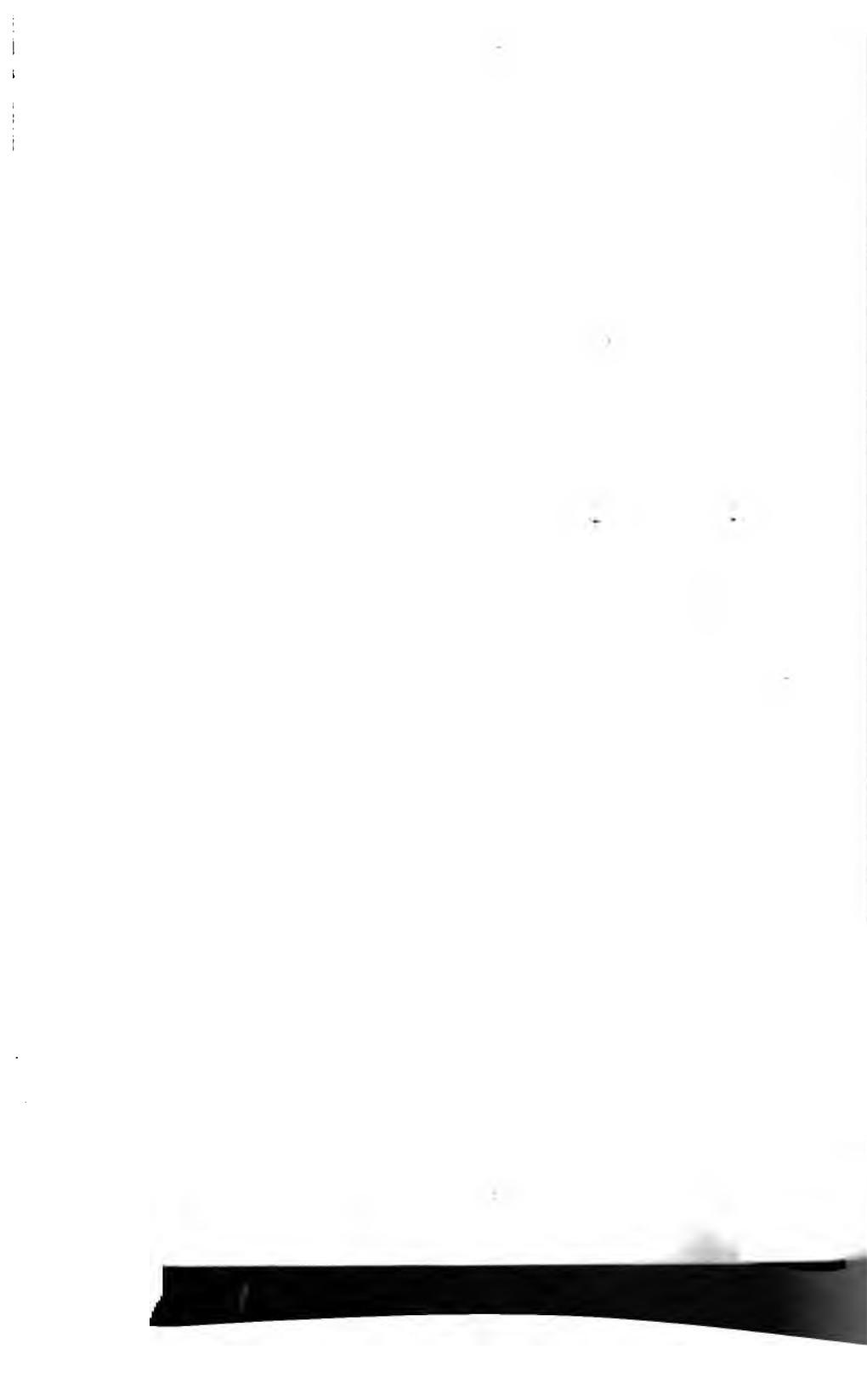


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were not entitled to recover. *Mosley v. Tinkler,* 692

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See PLE.

### HABEAS CORPUS.

Where a cause in the Palace Court was removed by *habeas corpus* into the Court of *King's Bench*, but was remanded back by *procedendo*, and afterwards interlocutory judgment was signed in the Court below, and a writ of inquiry executed:—*Held*, that the bail of the same defendant in another action brought in this Court had no right to remove the cause in the Palace Court again by *habeas corpus*, in order that the defendant might be rendered in discharge of his bail in the action in this Court.

But the Court gave the bail time to render, until fourteen days after the expiration of the custody in the Palace Court, no cause being shewn against so much of the rule for such time. *Lanes v. Hutchinson,* 766

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### HABEAS CORPUS AD TESTIFICANDUM.

A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up. *Fennell v. Tait,* 584

### HOLDING TO BAIL.

Where a defendant is arrested and goes to prison, it is “an arrest and holding to bail,” within the meaning of the statute 43 Geo. 3, c. 46. *Preedy v. M'Farlane,* 819

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### IMPARLANCE.

Imparrances are abolished by the Uniformity of Process Act. *Nurse v. Geeting,* 567

## INSOLVENT DEBTOR.

After taking the benefit of the Insolvent Act, a debtor contracted a new debt, and accepted a bill of exchange for the balance of the old and new debt. Being sued upon the bill, he gave a warrant of attorney for the amount; and judgment being entered up upon this warrant of attorney, the Court refused to set it aside. *Philpot v. Aslett,* 85

## INROLMENT.

*See BANKRUPT (certificate).  
STAMP, 1.*

## INDORSEMENT.

*See PRACTICE.  
PROCESS.*

## LANDLORD AND TENANT.

1. A lease contained a stipulation, that, for every acre, and so in proportion for a less quantity of the land which the lessee should *suffer to be occupied* by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, *occupy*, dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course:—*Held*, that the landlord was entitled to the additional rent, this being an occupation of the land by other persons. *Greenslade v. Tapscott,* 55

2. A tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up his hostile

title, not with the intention that he should hold under the lease:—*Held*, that the term was forfeited. *Doe d. Ellerbrock v. Flynn,* 137

3. A tenant gave a bill of sale to a creditor, under which his goods (including certain eatage) were about to be sold, and the landlord, before the sale took place, put in a distress; whereupon it was agreed, that the sale by the creditor should proceed, and that the landlord should be paid his arrears out of the proceeds of the goods and eatage. The plaintiff having purchased the eatage at the sale, put in his cattle to depasture it; and the amount of the sale not being sufficient to cover the arrears of rent, the landlord distrained again, and took those cattle as a distress:—*Held*, (*Parke, B., diss.*) that a contract was to be implied on the part of the landlord not to distrain the cattle of the purchaser of the eatage. *Horsford v. Webster and Deacon,* 696

4. Where an instrument, which was in reality a lease, but which bore an agreement stamp for 15*s.*, was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l.* 10*s.*, but was stamped in 1834 under the provisions of the 37 Geo. 3, c. 136, s. 2, with a stamp of 1*l.*, being the amount of the stamp then in force:—*Held*, that the proper duty had been paid.

1. demised to *B.* certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The leased died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent:—*Held*, that they

were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract. *Buckworth v. Simpson*, 834

### LEGACY DUTY.

Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest among poor pious persons, in *ten or fifteen pounds*, as they should see fit.

If any of the objects of the above bounty should have received to the amount of *20l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to return the duty chargeable on such amount. *In the matter of Wilkinson*, 142

### LEVARI FACIAS.

Lodging a writ of *levari facias* with the registrars of the bishop of the diocese, does not bind the property of the incumbent from the time of its being lodged. *Waite v. Bishop*, 507

### LIBEL.

*See VENUE.*

1. The declaration stated that the defendant had been employed by the plaintiff to edit the *Court Journal* for reward, and that he did not perform the duties of editing the same in a proper manner, *but, without the knowledge, leave, authority, or consent of the plaintiff, "falsely, maliciously, and negligently inserted and published in the same a false and malicious libel,"*

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tial and privileged, that such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt. *Warren v. Warren,* 250

## LICENCE.

*See EASEMENT.*

## LIMITATIONS, STATUTE OF.

*See ACTION.*

1. A defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit; the plaintiff replied that the cause of action did arise within six years, &c.:—*Held*, that the plaintiff might prove a *quo minus* to have been issued within the six years, and to have been continued down to the time of the defendant's appearance.

On the trial of an issue, whether the cause of action arise within six years next before the commencement of the suit, the plaintiff produced the roll on which the continuances appeared to have been regularly entered up. It appeared from the writs themselves, that the second writ, which was an *alias quo minus*, was tested on a day subsequent to the day of the teste of the first writ:—*Held*, that the roll being right, the Court could not look to any thing else to contradict it. *Dickenson v. Teague,* 241

2. In order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a greater debt. *Tippets v. Heane,* 252

3. A writ issued under 2 & 3 Will. 4, c. 39, s. 10, to prevent the operation of the Statute of Limitations, may be returned *non est inventus*

without any attempt at service. *Williams v. Roberts,* 676

## LOCAL ACT.

1. A local act provided that no ditch, &c., should be arched over, &c., without the consent of the trustees under the act, under a penalty of 50*l.*:—*Held*, that a surveyor, who, after a sewer had been commenced, directed it to be continued (without the consent of the trustees), had incurred the penalty.

A local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded, need not be proved either to have been examined with the Parliament roll, or to have been printed by the king's printer. *Woodward v. Cotton,* 44

2. By a local act for paving, watching, lighting, and improving the city of *L.*, commissioners were appointed for carrying the act into effect, and a penalty was imposed upon such of them, as, being personally interested in the matter in question, should act as commissioners in the execution of the act. One of the commissioners, being personally interested in the construction of a footpath opposite his own house, attended a meeting of the commissioners, and spoke upon the question of the mode of constructing such footpath:—*Held*, that this was evidence to go to the jury of an *acting* as a commissioner. *Charlesworth v. Rudgard,* 438

## MANOR.

*See EVIDENCE, 6.*

## MEMORANDA, 404, 660.

## MISNOMER.

A plaintiff declared by the name of *William Moody*, and the cause pro-